Docket for 02-1290

No. 02-1290 Status: GRANTED
Title: United States Postal Service, Petitioner
v.
Flamingo Industries (USA) Ltd., et al.
Docketed: March 4, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-15963)
Decision Date: August 23, 2002
Rehearing Denied: November 4, 2002

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 23 2003	Application (02A596) to extend the time to file a petition for a writ of certiorari from February 2, 2003 to March 4, 2003, submitted to Justice O'Connor.
Jan 23 2003	Application (02A596) granted by Justice O'Connor extending the time to file until March 4, 2003.
Mar 4 2003	Petition for writ of certiorari filed. (Response due April 3, 2003)
Mar 26 2003	Order extending time to file response to petition to and including April 24, 2003.
Apr 23 2003	Brief of respondents Flamingo Industries (USA) Ltd., et al. in opposition filed.
May 8 2003	Reply of petitioner United States Postal Service filed.
May 27 2003	Petition GRANTED.
Jul 3 2003	Motion of petitioner to dispense with printing of the joint appendix filed.
Jul 11 2003	Brief of petitioner United States Postal Service filed.
Jul 11 2003	Brief amicus curiae of Center for the Advancement of Capitalism filed.
Aug 4 2003	Motion of petitioner to dispense with printing the joint appendix GRANTED.
Aug 5 2003	Extension of time within which to file respondent's brief on the merits to and including September 15, 2003.
Sep 8 2003	Brief amicus curiae of Postalwatch Incorporated filed.
Sep 15 2003	Brief of respondents Flamingo Industries (USA) Ltd., et al. in opposition filed.
Sep 15 2003	Brief amicus curiae of Washington Legal Foundation filed.
Sep 15 2003	Brief amicus curiae of American Trucking Associations, Inc. filed.
Sep 24 2003	SET FOR ARGUMENT Monday, December 1, 2003.
Oct 3 2003	CIRCULATED.
Oct 21 2003	Reply of petitioner United States Postal Service filed (Distributed).
Oct 23 2003	Record received from the U.S.C.A. for the 9th Circuit. (1 envelope)
Oct 27 2003	Record received from the U.S.D.C. for the Northern District of California. (1 envelope)

Supreme Court, U.S.
FILED

021290 MAR 4 2003

No.

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal antitrust laws apply to a "person," which is defined to include "corporations and associations existing under or authorized by the laws of * * * the United States." 15 U.S.C. 7 (Sherman Act), 12(a) (Clayton Act). The question presented is whether the United States Postal Service is a "person" amenable to suit under the antitrust laws.

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In the Supreme Court of the United States

No.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Postal Service (Postal Service), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 302 F.3d 985. The opinion of the district court (App., *infra*, 23a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2002. A petition for rehearing was denied on November 4, 2002 (App., *infra*, 28a-29a). On January 23, 2003, Justice O'Connor extended the time

within which to file a petition for a writ of certiorari to and including March 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App., *infra*, 30a-34a.

STATEMENT

1. Flamingo Industries (USA) Ltd. (Flamingo), a manufacturer of mail sacks, and its owner, Arthur Wah, brought suit in the United States District Court for the Northern District of California against the Postal Service in connection with the Postal Service's termination of a contract with Flamingo to produce U.S. Mail sacks. In addition to asserting claims under the federal procurement laws and state law, the complaint stated five federal antitrust claims, alleging that the Postal Service sought to suppress competition and create a monopoly in mail sack production by procuring cheaper mail sacks that were manufactured in Mexico. The district court dismissed the complaint in its entirety. App., *infra*, 23a-27a. It dismissed the antitrust claims on the ground that Congress did not intend to impose antitrust liability on the Postal Service. *Id.* at 23a-24a. The district court explained that, although Congress has waived the Postal Service's sovereign immunity in 39 U.S.C. 401(1) by permitting the agency "to sue and be sued" in its own name, "such language cannot * * * subject [the Postal Service] to liability under the antitrust laws as there was no attempt on the part of Congress to impose liability in the first place." App., *infra*, 24a (internal quotation marks omitted).

2. The United States Court of Appeals for the Ninth Circuit reversed, in relevant part, holding that the Postal Service is a "person" subject to suit under the

federal antitrust laws. App., *infra*, 1a-22a. The court of appeals acknowledged (*id.* at 4a) that the issue of a federal agency's amenability to suit is governed by this Court's two-step inquiry set forth in *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994), under which a court must determine, first, whether Congress has waived the agency's sovereign immunity and, second, whether "the source of substantive law upon which the claimant relies provides an avenue for relief" against the federal government.

Under *Meyer*'s first step, the court of appeals held that Congress waived the Postal Service's sovereign immunity by providing in 39 U.S.C. 401(1) that "[t]he Postal Service shall have the . . . power[] to sue and be sued in its official name." App., *infra*, 4a (brackets in original). In considering the second question, whether the antitrust laws provide a cause of action against the Postal Service, the court of appeals rejected the Postal Service's reliance on precedent (*e.g.*, *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941); *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982)) holding that the United States and its instrumentalities are not "persons" subject to suit under the antitrust laws. The court reasoned that, "[a]lthough a federal sovereign is not a 'person,' the Postal Service is not a sovereign" because "the Postal Service does not enjoy sovereign immunity." App., *infra*, 8a. The court accordingly concluded that "[t]he Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." *Id.* at 10a. The court stated, however, that the Postal Service may assert "conduct-based" immunity against antitrust liability "if the action of the Postal Service

being challenged was taken at the command of Congress." *Id.* at 13a.[1]

On November 4, 2002, the court of appeals denied the government's petition for rehearing and rehearing en banc. App., *infra*, 28a-29a.

REASONS FOR GRANTING THE PETITION

Since the founding of this Nation, postal service operations have constituted an essential "sovereign function." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981). Congress carried forward that tradition in the Postal Reorganization Act of 1970 by creating the Postal Serice as "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Notwithstanding the Postal Service's manifestly governmental character, the court of appeals held that the Postal Service is "not a sovereign" and, therefore, is a "person" subject to suit under the federal antitrust laws. App., *infra*, 8a.

The court of appeals' decision conflicts with the decision of this Court in *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), that the United States is not a "person" under the antitrust laws. The decision conflicts as well with the decisions of the courts of appeals that

[1] The court of appeals also reinstated the plaintiffs' claim under 28 U.S.C. 1491(b)(1) alleging violations of the Postal Service's Procurement Manual, and affirmed the district court's dismissal of the remaining claims. App., *infra*, 13a-22a. On the procurement claim, the court held, following the Federal Circuit's decision in *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071, 1080-1081 (2001), that the Postal Service is a "federal agency" within the meaning of 28 U.S.C. 1491(b)(1), which provides for jurisdiction in the Court of Federal Claims (and in the district court in this case) over suits challenging contract actions in violation of procurement laws or regulations. See App., *infra*, 15a.

have held that federal instrumentalities likewise are not "persons" subject to antitrust liability.

The court of appeals' decision also conflicts with the Court's ruling in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), that Congress's waiver of sovereign immunity with respect to a federal entity does not create a substantive cause of action against the entity. The court of appeals' decision similarly conflicts with the decisions of other courts of appeals that have specifically held that Congress's waiver of the Postal Service's sovereign immunity does not create liability against the Postal Service.

The court of appeals' decision exposes the Postal Service to significant and unwarranted litigation costs under the antitrust laws, which include treble damages and attorneys' fees. That result could undermine the ability of the Postal Service to carry out its legislative mandate to provide universal mail service at reasonable rates. This Court's review is accordingly warranted.

A. The Court Of Appeals' Decision Conflicts With *United States* v. *Cooper* And Appellate Decisions Holding That The United States And Its Agencies And Instrumentalities Are Not "Persons" Subject To Suit Under the Antitrust Laws

1. This Court in *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-606 (1941), held that Congress did not intend the statutory term "person" as used in the antitrust laws to include the United States. The Court therefore rejected the federal government's contention that the United States is a "person" authorized to sue for treble damages under the Sherman Act. The Court reasoned that, if the United States were a "person" entitled to sue, the United States would likewise be a "person" subject to liability under the Sherman Act, since the term has the same meaning when used

throughout the Act. *Id.* at 604-610. Concluding that the United States is not a "person" in either instance, the Court explained that, "[w]ithout going beyond the words of the section," "the phrase 'any person' is insufficient" to encompass the United States. *Id.* at 606.

Just as Congress did not intend the United States to be a "person" under the antitrust laws, Congress did not intend an agency or instrumentality of the United States to be a "person" under those laws. This Court repeatedly has held that Congress's intent to exclude the sovereign from the statutory term "person" equally excludes agencies and instrumentalities of the sovereign. The Court thus has concluded that state agencies are not persons liable under the False Claims Act, 31 U.S.C. 3729 (*Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 778-788 (2000)); that federal agencies were not persons under the removal provisions of 28 U.S.C. 1442(a)(1) (1988) (*International Primate Prot. League* v. *Tulane Educ. Fund*, 500 U.S. 72, 82-83 (1991)); that state agencies are not persons liable under 42 U.S.C. 1983 (*Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989)); and that federal instrumentalities are not "persons" under the Clean Water Act, 33 U.S.C. 1362(5) (*EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 222 n.37 (1976)). Where Congress has intended a contrary conclusion, it has expressly so provided. See, *e.g.*, 15 U.S.C. 1127 (defining "person" amenable to suit under the Lanham Act to include "the United States [or] any agency or instrumentality thereof").[2]

[2] Similarly, governmental agencies and instrumentalities equally share in the immunity of the sovereign. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); see *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 (1997) ("It has long been settled that the reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.").

The exclusion of the United States from the term "person" in federal statutes applies with equal force to United States agencies and instrumentalities such as the Postal Service. The Postal Service is a quintessential agency or instrumentality of the United States. This country, like foreign nations, has from the beginning treated postal services as "a sovereign function" and "a sovereign necessity." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 121. The Continental Congress in 1775 appointed Benjamin Franklin as Postmaster General responsible for the delivery of mail. *Ibid.* And exercising its constitutional authority "[t]o establish Post Offices and Post Roads," U.S. Const. Art. I, § 8, Cl. 7, the First Congress in 1789 created the Office of the Postmaster General to oversee federal postal operations. Act of Sept. 22, 1789, ch. 16, 1 Stat. 70. Congress later granted the Postal Service exclusive rights to transmit letters, packages, and "other mailable matter," Act of Mar. 3, 1845, ch. 43, § 10, 5 Stat. 736, and formally established the Post Office Department as a department of the Executive Branch. Act of June 8, 1872, ch. 335, 17 Stat. 283.

Under the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, Congress transferred the responsibilities of the Post Office Department to the Postal Service. Congress did not establish the Postal Service as a corporation with a corporate charter or equity ownership interests. Thus, contrary to the court of appeals' belief (App, *infra*, 11a), Congress made no

change in 1970 that would bring the Postal Service within the definition of "person" in 15 U.S.C. 7 which includes "corporations" organized under the laws of the United States or a State or territory. Rather, Congress created the Postal Service as "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Indeed, Congress expressly stated that "a basic and fundamental service" would thereby be "provided to the people *by the Government of the United States* * * * to bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. 101(a) (emphasis added).

The Postal Service is run by a Board of Governors whose eleven members are "officer[s] of the Government." 39 U.S.C. 202, 205(d). The President appoints, subject to Senate confirmation, nine of the eleven members, who in turn select the remaining two members, the Postmaster General and the Deputy Postmaster General. 39 U.S.C. 202(a), (c) and (d). Postal Service employees are federal employees who must take a public oath of office, 39 U.S.C. 410, 1001, 1011, and all liabilities incurred by the Postal Service, such as litigation judgments and settlements, are ultimately financed by the public fisc, 39 U.S.C. 2001, 2003, 2008(c). The Postal Service has uniquely federal sovereign powers, including the authority "to exercise, in the name of the United States, the right of eminent domain" (39 U.S.C. 401(9)); to negotiate international postal treaties and conventions (39 U.S.C. 407); to borrow on the United States' "full faith and credit" (39 U.S.C. 2006(c)(1)); and "to investigate postal offenses and civil matters relating to the Postal Service" (39 U.S.C. 404(7)). Congress has also given the Postal Service exclusive rights over the carriage of letters to

and from the United States. *Air Courier Conf.* v. *American Postal Workers Union*, 498 U.S. 517, 519 (1991) (citing 39 U.S.C. 601-606 and 18 U.S.C. 1693-1699). Because these various provisions of the Postal Reorganization Act make clear that the Postal Service is an agency or instrumentality of the United States, it is not subject to suit under the antitrust laws.

2. The court of appeals' treatment of the Postal Service as a "person" under the antitrust laws conflicts with the consistent view of other courts of appeals that have concluded that Congress's exclusion of the United States from the term "person" applies with equal force to its agencies and instrumentalities. In the first appellate decision to address the issue, *Sea-Land Serv. Inc.* v. *Alaska R.R.*, 659 F.2d 243, 245 (1981), cert. denied, 455 U.S. 919 (1982), the D.C. Circuit, in an opinion authored by then-Judge Ginsburg, held that the Sherman Act "does not expose United States instrumentalities to liability * * * for conduct alleged to violate antitrust constraints."

As the D.C. Circuit explained (659 F.2d at 245), Congress responded to the Court's decision in *Cooper*, *supra*, by amending the Clayton Act, Pub. L. No. 84-137, 69 Stat. 282, to authorize the United States to bring an action for actual, but not treble, damages. 15 U.S.C. 15a (Supp. III 1956). "Given the discrete consideration Congress gave to the situation of the United States, after the decision in *Cooper Corp.*, as a Sherman Act damage action plaintiff, and the legislature's total silence on the situation of the United States as a Sherman Act defendant," the D.C. Circuit declined to impose liability against the United States when Congress itself "failed to do" so. *Sea-Land*, 659 F.2d at 246. The court of appeals therefore concluded that the antitrust laws did not reach the Alaska Railroad and its

supervising United States agencies, even though such entities may "operat[e] alongside private companies" and provide goods and services similar to those available in the marketplace. *Id.* at 247.

The other courts of appeals that have considered the issue have followed the *Sea-Land* decision and have likewise held that federal agencies and instrumentalities are not amenable to suit under the antitrust laws. Thus, the Sixth Circuit in *Jet Courier Services, Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221, 1228 (1983), held that the Federal Reserve Banks are not persons under the Sherman Act. The Sixth Circuit explained that "[a]s an agency of the federal government the Federal Reserve System may not be sued under the Sherman Act." *Id.* at 1228 (citing *Sea-Land*, *supra*). The Second Circuit in *Name.Space, Inc.* v. *Network Solutions, Inc.*, 202 F.3d 573, 580-581 (2000), also followed *Sea-Land* and concluded that the National Science Foundation is not subject to the antitrust laws. The court explained that "the scope of the immunity conferred as a result of being a federal instrumentality is paradigmatically equivalent to that enjoyed by the United States itself, and therefore absolute." *Id.* at 581.

The Fourth Circuit in *Rex Systems, Inc.* v. *Holiday*, 814 F.2d 994, 995-997 (1987), similarly found "the *Sea-Land* court's holding to be persuasive" and held that the Department of the Navy is not a person under the Sherman Act. Likewise, the Fifth Circuit in *Greenwood Utility Commission* v. *Mississippi Power Co.*, 751 F.2d 1484, 1504 (1985), relied on the *Sea-Land* decision and held that the Southeastern Power Administration is, "of course, not subject to the antitrust laws." Finally, the Seventh Circuit concluded that the Army and Air Force Exchange Service "is a governmental instrumentality" and therefore not subject to suit under the Clayton Act.

Champaign-Urbana News Agency, Inc. v. *J.L. Cummins News Co.*, 632 F.2d 680, 689, 692 (1980).[3]

Thus, in ruling that an agency or instrumentality of the United States is subject to suit under the antitrust laws, the court of appeals has departed from the uniform course of lower court decisions.

3. The court of appeals attempted to distinguish *Sea-Land* and later decisions because the court of appeals viewed those decisions to "require (or assume) that the federal instrumentality at issue enjoys sovereign immunity." App., *infra*, 10a. That is not correct. *Sea-Land* did not turn on the presence or absence of sovereign immunity from suit generally. Indeed, the D.C. Circuit explicitly recognized that Section 702 of the Administrative Procedure Act, 5 U.S.C. 702, had "eliminate[d] the defense of sovereign immunity for actions in specific, nonmonetary relief." 659 F.2d at 244-245. The court of appeals accordingly observed that, "[w]ere sovereign immunity our sole concern, * * * we would hold the named United States agencies and officials answerable in this action." *Id.* at 244. The court nonetheless held that the substantive provisions of the Sherman Act do not reach "United States instrumentalities." *Id.* at 245.

Similarly, the Sixth Circuit's decision in *Jet Courier* held that the antitrust laws do not apply to a Federal Reserve Bank, which may "sue and be sued" under 12 U.S.C. 341. Although the decision in *Jet Courier* did

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[3] The court of appeals itself had previously stated that the assertion of antitrust liability against a federal agency was "frivolous." *Department of Water & Power* v. *Bonneville Power Admin.*, 759 F.2d 684, 693 n.12 (1985); see *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286, 1288 (1985) (holding that the Guam Airport Authority is not a person subject to antitrust liability), cert. denied, 475 U.S. 1081 (1986).

not discuss Congress's waiver of the Federal Reserve Bank's sovereign immunity in 12 U.S.C. 341, the court of appeals' holding in this case that the Postal Service is a person subject to antitrust liability by virtue of a "sue-and-be-sued" clause is fundamentally inconsistent with the result reached by the Sixth Circuit in *Jet Courier*.[4]

B. The Court Of Appeals' Decision Conflicts With *FDIC* v. *Meyer* And Other Appellate Decisions Holding That Congress's Waiver Of A Federal Agency's Sovereign Immunity From Suit Does Not Create A Cause Of Action Against The Agency

1. In holding that a cause of action under the antitrust laws may be maintained against the Postal Service, the court of appeals relied solely on the fact that Congress has waived the Postal Service's sovereign immunity by permitting it "to sue and be sued"

[4] Congress in similar terms has waived the government's sovereign immunity with respect to numerous other federal entities. 7 U.S.C. 942 (Rural Telephone Bank); 7 U.S.C. 1506 (Federal Crop Insurance Corporation); 12 U.S.C. 635(a)(1) (Export-Import Bank of the United States); 12 U.S.C. 1441a(a)(5)(J) (Thrift Depositor Protection Oversight Board); 12 U.S.C. 1441a(b)(9)(E) (Resolution Trust Corporation); 12 U.S.C. 1789(a)(2) (National Credit Union Administration); 12 U.S.C. 1819 (Federal Deposit Insurance Corporation); 12 U.S.C. 2013(4) (Farm Credit Banks); 12 U.S.C. 2073(4) (Production Credit Associations); 12 U.S.C. 2093 (Federal Land Bank Associations); 12 U.S.C. 2278a-3 (Farm Credit System Assistance Board); 12 U.S.C. 2278b-4 (Farm Credit System Financial Assistance Corporation); 12 U.S.C. 2279aa-3 (Federal Agricultural Mortgage Corporation); 12 U.S.C. 2289(1) (Federal Financing Bank); 15 U.S.C. 634(b)(1) (Small Business Administration); 15 U.S.C. 714b (Commodity Credit Corporation); 22 U.S.C. 290f (Inter-American Foundation); 22 U.S.C. 2199(d) (Overseas Private Investment Corporation); 29 U.S.C. 1302(b)(1) (Pension Benefit Guaranty Corporation).

under 39 U.S.C. 401(1). The court of appeals concluded that such a waiver of sovereign immunity deprives the Postal Service of its status as a governmental entity. App., *infra*, 4a ("[T]he Postal Service lost its sovereign status pursuant to the Postal Reorganization Act of 1970 * * * which provides in relevant part that 'The Postal Service shall have the . . . power [] to sue and be sued."); *id.* at 8a ("Although a federal sovereign is not a 'person,' the Postal Service is not a sovereign."); *id.* at 10a ("Here, the Postal Service does not enjoy federal sovereignty."); *ibid.* ("The Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn."); *id.* at 13a ("Congress has stripped the Postal Service of its sovereign status by launching it into the commercial world as a sue-and-be-sued entity akin to a private corporation.").

The court of appeals' decision that a statutory waiver of sovereign immunity in a "sue and be sued" clause exposes the Postal Service to a cause of action under the antitrust laws squarely conflicts with the Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471 (1994). The Court in *Meyer* held that, although Congress waived the sovereign immunity of the FSLIC with a "sue-and-be-sued" clause (12 U.S.C. 1725(c)(4) (1988)), there nonetheless is no cause of action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), against federal instrumentalities. The Court in *Meyer* thus held that the court of appeals had erred in determining that "Meyer had a cause of action for damages against FSLIC *because* there had been a waiver of sovereign immunity." 510 U.S. at 483-484. The court explained that such "reasoning conflates" the question whether there is a waiver of a sovereign immunity with the "analytically distinct" question whether Congress

intended to create a cause of action. *Id.* at 484. The Court held that notwithstanding a waiver of sovereign immunity, a court must independently find that "the source of substantive law upon which the claimant relies provides an avenue for relief" against the government and its agencies. *Ibid.*

The court of appeals seriously erred in holding that, because Congress waived the Postal Service's sovereign immunity to suit, Congress intended to subject the Postal Service to the antitrust laws. Indeed, Congress's waiver of the Postal Service's *sovereign immunity* necessarily presupposes that the Postal Service is a sovereign arm of the United States Government and, as such, is not a "person" subject to suit under the antitrust laws.

2. a. For similar reasons, the court of appeals erred in relying (App., *infra*, 4a-6a, 8a, 10a) on this Court's decisions in *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512 (1984), and *Loeffler* v. *Frank*, 486 U.S. 549 (1988), as a basis for imposing substantive liability under the antitrust laws on the Postal Service. Those decisions did not work a radical change in the Court's jurisprudence, as the court of appeals seemed to believe. In *Franchise Tax Board*, the Court simply held that a "sue-and-be-sued" clause —which the Court had previously held in *FHA* v. *Burr*, 309 U.S. 242 (1940), subjects the federal agency concerned to garnishment orders issued by a state court— also applies to garnishment orders issued by a state administrative agency. In so ruling, the Court noted that the Postal Service was simply a stakeholder of the employee's wages that were the subject of the garnishment order. 467 U.S. at 520. In *Loeffler*, the Court simply applied to suits against the Postal Service under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

2000e *et seq.*, the already-settled rule (see 486 U.S. at 555) that the waiver of sovereign immunity in a "sue-and-be-sued" clause operates to waive the otherwise applicable rule of immunity of the federal government to an award of prejudgment interest.

Neither *Franchise Tax Board* nor *Loeffler* suggested that the "sue-and-be-sued" clause in Section 401(1) constitutes anything more than a waiver of sovereign immunity, or that such a clause is sufficient in itself to subject the Postal Service (or any other federal agency or instrumentality whose organic statute contains a similar clause) to new sources of liability under substantive law, such as the antitrust laws. 39 U.S.C. 401(1). Indeed, the Court in *Loeffler* explicitly recognized that the source of the Postal Service's liability under Title VII derives not from its "sue-and-be-sued" clause and the provisions of Title VII that apply to private parties, but rather from the separate and express provision under Section 717 of Title VII, 42 U.S.C. 2000e-16, provides for a cause of action against federal entities. 486 U.S. at 563. And the Court's subsequent decision in *Meyer*, 510 U.S. at 484, makes abundantly clear that Congress's waiver of sovereign immunity does not by its own force create a cause of action against federal entities.

b. The court of appeals' holding that the "sue-and-be-sued" clause in 39 U.S.C. 401(1) creates an antitrust cause of action against the Postal Service conflicts with decisions of the courts of appeals that have held— subsequent to *Franchise Tax Board* and *Loeffler*—that the "sue-and-be-sued" clause does *not* provide an independent source of liability against the Postal Service.

The Sixth Circuit in *Robinson* v. *Runyon*, 149 F.3d 507 (1998), and the Seventh Circuit in *Baker* v. *Runyon*, 114 F.3d 668 (1997), cert. denied, 525 U.S. 929 (1998),

have held that Congress's waiver of sovereign immunity in 39 U.S.C. 401(1) does not render the Postal Service liable for punitive damages under Title VII because such awards are not applicable to any "government [or] government agency" (see 42 U.S.C. 1981a(b)(1)). The Sixth Circuit in *Robinson* noted that although the Postal Service is a "commercial like" operation, "it functions as part of the federal government," exercises "uniquely governmental powers such as the authority to borrow money backed by the full faith and credit of the United States Government, the right of eminent domain, and the right to negotiate international postal treaties and conventions," and "shall be operated as a basic and fundamental service provided to the people *by the Government of the United States.*" 149 F.3d at 516 (citations omitted) (quoting 39 U.S.C. 101(a)). The court therefore concluded that, notwithstanding the waiver of sovereign immunity in the "sue-or-be-sued" clause, there is no "substantive law" that provides for punitive damages against government agencies. *Id.* at 517 (citing *FDIC* v. *Meyer*, 510 U.S. at 484). The court reasoned:

> [S]imply because Congress has provided that an entity may generally be sued for damages does not equate with the presumption that the particular law under which a plaintiff brings suit will permit such damages awards. * * * The mere fact that Congress even had to explicitly waive the sovereign immunity of the Postal Service in the first place indicates that Congress considered the Postal Service a federal agency, or otherwise such a waiver would be unnecessary.

Ibid. The Seventh Circuit in *Baker* similarly employed the two-step inquiry under *Meyer* and concluded that

Congress's waiver of sovereign immunity does not render the Postal Service liable for punitive damages under Title VII. 114 F.3d at 670-671.

In an analogous context, the Second Circuit in *In re Young*, 869 F.2d 158, 159 (1989) (per curiam), held that Congress's waiver of sovereign immunity in 39 U.S.C. 401(1) does not subject the Postal Service to trial by jury because 28 U.S.C. 2402 prohibits trial by jury against "the United States." The court of appeals explained that "the waiver of sovereign immunity does not, by itself, grant a right to trial by jury in an action against the federal government." 869 F.2d at 159. The court accordingly concluded that "the waiver does not change the fact that the party being sued is still the federal government." *Ibid.*

The decisions in *Robinson*, *Baker*, and *Young*, each hold that the Postal Service's amenability to suit under 39 U.S.C. 401(1) does not deprive the Postal Service of its governmental character and independently create a substantive right against the Postal Service. Those decisions cannot be reconciled with the court of appeals' holding below that the Postal Service is subject to suit under the antitrust laws solely by virtue of Congress's waiver of sovereign immunity in 39 U.S.C. 401(1).

C. The Court Of Appeals' Decision Threatens To Impose Unwarranted Costs And Liabilities On The Postal Service

1. This Court's review is warranted not only because the court of appeals' decision conflicts with decisions of this Court and other courts of appeals, but also because it seriously threatens to interfere with the operations of the Postal Service. Congress has directed that the Postal Service "shall provide adequate and efficient postal services at fair and reasonable rates and fees"

and "shall serve as nearly as practicable the entire population of the United States." 39 U.S.C. 403. The Postal Service also must operate "so that the total estimated income and appropriations * * * will equal as nearly as practicable total estimated costs." 39 U.S.C. 3621. Subjecting the Postal Service to the antitrust laws, whose sanctions include treble damages and attorney's fees (15 U.S.C. 15(a)), could significantly impair the Postal Service's ability to carry out its legislative mandate to deliver universal mail service to the entire nation under a break-even requirement.[5]

The breadth and variety of the Postal Service's operations present an immediate likelihood of substantial litigation costs and potential liabilities. The Postal Service exercises exclusive distribution rights over the carriage of letters to and from the United States, *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. at 519, and the Postal Service provides express-mail, parcel, overseas, and other delivery services by competing with private businesses. United States Postal Service, *2002 Annual Report* 52-53 (*2002 Annual Report*). The Postal Service employs 770,000 workers to deliver 200 billion pieces of mail each year (40% of the world's mail), and is the eleventh largest enterprise in the Nation based on its $66 billion in annual revenues. United States Postal Service, *Transformation Plan* i (Apr. 2002) (*2002 Transformation Plan*).

Application of the antitrust laws could impose significant expenses and delay on Postal Service operations that would inevitably flow from having to defend against antitrust claims. In light of economic uncer-

[5] Indeed, the antitrust laws provide for criminal penalties in certain circumstances. See 15 U.S.C. 1, 2, 13a.

tainties, increased security needs, and advances in communications technology that reduce the volume of mail, *2002 Annual Report* 16; *2002 Transformation Plan* i, 1-3, the Postal Service cannot readily afford increased costs that Congress neither intended nor anticipated. Indeed, the burdens associated with litigation costs, settlements, or judgments will be borne by American citizens, either through higher service fees or larger budgetary appropriations. 39 U.S.C. 2001, 2003, 2008(c).

2. Nor is the need for this Court's review diminished by the court of appeals' statement that, although the Postal Service is subject to suit under the antitrust laws, it would recognize an exception from liability if the "action being challenged by the Postal Service was taken at the command of Congress." App., *infra*, 13a. The court of appeals' decision would force the Postal Service to undergo potentially extensive and costly litigation to determine the precise contours of such an exception and whether a court will deem it to apply in a given case. Because Congress never intended to subject the Postal Service to suit under the antitrust laws in the first place, there is no basis for imposing those costs and burdens on the Postal Service.

That conclusion holds true regardless of how the court of appeals envisioned that such an exception might apply. Indeed, the exception would be largely meaningless if the Postal Service had to prove that Congress "command[ed]" the particular challenged action at issue, because Congress commands relatively few of the Postal Service's commercial activities. The salient fact is that the Postal Service is a federal agency or instrumentality and is authorized to take all actions "incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers."

39 U.S.C. 401(10). At a minimum, the court of appeals' decision would create an entirely unnecessary and cumbersome regime by requiring the Postal Service to prove, on a case-by-case basis, that the challenged action was taken pursuant to a sufficient congressional mandate. Cf. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 39 (1985) (municipal action not shielded from antitrust laws unless municipality establishes that it was taken pursuant to a "clearly articulate and affirmatively expressed . . . state policy") (citation omitted). Because such a regime would itself impose litigation costs and burdens that Congress never intended, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15963

FLAMINGO INDUSTRIES (USA) LTD. AND ARTHUR WAH, PLAINTIFFS-APPELLANTS

v.

UNITED STATES POSTAL SERVICE, AN ENTITY CREATED PURSUANT TO THE POSTAL REORGANIZATION ACT, DEFENDANT-APPELLEE

Filed Aug. 23, 2002

OPINION

Before: LAY,* THOMPSON, and TALLMAN, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge.

Plaintiffs Flamingo Industries and its owner Arthur Wah (collectively "Flamingo") brought suit in the Northern District of California against the United States Postal Service. Flamingo asserted a number of federal and state law claims stemming from the Postal Service's termination of Flamingo's contract to produce U.S. Mail sacks. The district court dismissed the suit for lack of jurisdiction and improper venue, and did not

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

reach the merits of any of the claims. Flamingo appeals.

According to the allegations of Flamingo's complaint, which we take as true for purposes of this appeal, the Postal Service terminated Flamingo's contract because it wanted to use cheaper mail sacks manufactured in Mexico, sacks that fail to meet safety and quality regulations. To disguise this scheme, the Postal Service adopted outdated requirements for mail sacks that could not be met by the modern machines used by Flamingo and other domestic manufactures, creating a pretext for canceling the domestic mail sack contracts. Once those contracts were canceled, the Service declared a fake emergency in the supply of mail sacks that allowed it to award future contracts to foreign manufactures on a no-bid basis. The Service sought to hide the false nature of this emergency by failing to follow regulations requiring documentation of any emergency.

Based on this alleged conduct, Flamingo asserted five federal antitrust claims, alleging that the Postal Service, in collusion with Mexican mail sack manufacturers, sought to suppress competition and create a monopoly in mail sack production in violation of federal antitrust laws. Flamingo also asserted claims alleging that the Postal Service violated the Postal Service Procurement Manual, the implied covenant of good faith and fair dealing, California Business and Professions Code § 17200, and 42 U.S.C. § 1983.

The district court did not reach the merits of any of these claims. It dismissed the federal antitrust claims on the ground that the Postal Service was protected by sovereign immunity from antitrust liability. It determined that the claim for breach of the implied covenant of good faith and fair dealing was a tort claim, and dismissed it for lack of exhaustion under the Federal Tort Claims Act. The court dismissed the remaining claims on the ground that venue did not lie in the Northern District of California.

We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for further proceedings. We conclude that: (1) Flamingo may pursue claims against the Postal Service for alleged violations of federal antitrust laws because Congress has withdrawn the cloak of sovereign immunity from the Postal Service and given it the status of a private corporation; (2) the district court had jurisdiction over Flamingo's Procurement Manual claim pursuant to 28 U.S.C. § 1491(b); (3) the court properly dismissed Flamingo's breach of implied covenant claim for failure to exhaust under the Federal Tort Claims Act; (4) although the district court had original jurisdiction over Flamingo's claim asserted under California Business & Professions Code § 17200, that claim was properly dismissed because it is preempted by federal law; (5) Flamingo's 42 U.S.C. § 1983 claim fails to state a claim upon which relief can be granted; and (6) venue for the Postal Service Procurement Manual claim was properly laid in the Northern District of California.

I

THE FEDERAL ANTITRUST LAW CLAIMS

Flamingo argues the district court erred in holding that sovereign immunity bars its suit against the Postal Service under federal antitrust laws.[1] Flamingo con-

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[1] We do not distinguish between the various sections of the federal antitrust laws relied upon by Flamingo in its complaint—15 U.S.C. §§ 1, 13, 13a, 14, 45—because all of these sections are sub-

tends the Postal Service lost its sovereign status pursuant to the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified as amended in Title 39 of the United States Code), which provides in relevant part that "The Postal Service shall have the . . . power[] to sue and be sued in its official name." 39 U.S.C. § 401(1). We agree.

In *FDIC* v. *Meyer*, 510 U.S. 471, 484, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994), the Supreme Court applied a two-step inquiry in analyzing whether a federal instrumentality enjoys immunity from a particular substantive area of law. Under this analysis, "[t]he first inquiry is whether there has been a waiver of sovereign immunity." *Id.* If there has been, "the second inquiry . . . [is] whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Id.*

A

Following *Meyer*, we first consider whether 39 U.S.C. § 401(1) operates as a waiver of the Postal Service's sovereign immunity. More precisely, our inquiry is whether the sue-and-be-sued language of that section waives sovereign immunity as to the plaintiffs' antitrust claims.

The Supreme Court established the breadth of the Postal Service's sovereign immunity waiver in *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 104 S. Ct. 2549, 81 L. Ed. 2d 446 (1984). There, the issue was whether the Postal Service had to comply with a state tax board's liens on Postal Service employees' salaries. The Court began its analysis by

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ject to the same analysis as to the sovereign immunity issue presented.

recognizing that the general presumption is that a sue-and be-sued clause should be liberally construed: "[W]hen Congress establishes . . . an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." *Id.* at 517 (quoting *FHA* v. *Burr*, 309 U.S. 242, 245, 60 S. Ct. 488, 84 L. Ed. 724 (1940)). To overcome this presumption "it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Id.* at 517-18 (quoting *Burr*, 309 U.S. at 245).

The Postal Service could not overcome the presumption. In doing away with the Post Office Department and creating the Postal Service in the Postal Reorganization Act, Congress had "indicated that it wished the Postal Service to be run more like a business than had its predecessor . . . ." *Id.* at 519-20. Congress had "'launched [the Postal Service] into the commercial world'; hence under *Burr* not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the Service's liability is the same as that of any other business." *Id.* at 520 (brackets in original).

The Court reaffirmed the breadth of the Postal Service's waiver in *Loeffler* v. *Frank*, 486 U.S. 549, 108 S. Ct. 1965, 100 L. Ed. 2d 549 (1988). There, a mail carrier had successfully maintained a Title VII action against the Postal Service and was seeking prejudgment interest on his award of damages. *Id.* at 552.

Title VII allowed for actions against the federal government, *see* 42 U.S.C. § 2000e-16, but it did not contain a provision allowing for prejudgment interest against the government. Indeed, just two years earlier, in *Library of Congress* v. *Shaw*, 478 U.S. 310, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986), the Supreme Court had held that sovereign immunity barred the payment of interest on an award under Title VII against the Library of Congress. The Court in *Loeffler*, however, distinguished *Shaw* because, unlike the Library of Congress, the Postal Service's sovereign immunity had been waived. *Loeffler*, 486 U.S. at 554-56, 565.

The Court stressed the difference between a sovereign instrumentality, such as the Library of Congress, and a non-sovereign sue-and-be-sued instrumentality, such as the Postal Service. The Court stated that in *Shaw*, "the starting point for our analysis was the 'no-interest rule,' which is to the effect that, absent express consent by Congress, the United States is immune from interest awards . . . . The dispositive question was . . . whether Title VII contained an express waiver of the Library of Congress' immunity from interest." *Loeffler*, 486 U.S. at 565 (citation omitted). It did not. However, "'[t]he no-interest rule is . . . inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise.'" *Id.* (quoting *Shaw*, 478 U.S. at 317 n.5). "In creating the Postal Service, Congress [cast off the cloak of sovereignty], and therefore, the no-interest rule does not apply to it." *Id.*

In 1994, the Court returned to the sue-and-be-sued issue in *Meyer*, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed.2d 308. There, the plaintiff prevailed at trial in a

Bivens[2] action against the Federal Savings and Loan Insurance Corporation (FSLIC), which was a federal sue-and-be-sued instrumentality. After the FDIC, the successor in interest to the FSLIC, appealed unsuccessfully, the Supreme Court granted certiorari. *Id.* at 473-75. In rejecting the FDIC's argument that the FSLIC enjoyed sovereign immunity, the Court reiterated that "sue-and-be-sued waivers are to be 'liberally' construed . . . notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." *Id.* at 480 (citation omitted). Further, the fact that *Bivens* actions were not generally available against private corporations was not controlling. "[W]e [have] looked to the liability of a private enterprise as a floor below which [a sue-and-be-sued] agency's liability could not fall," not a ceiling that may not be exceeded. *Id.* at 482-83 (emphasis omitted). Thus, the waiver of the FSLIC's immunity included federal constitutional torts. *Id.* at 483. The Court went on to hold, however, that *Bivens* actions could not be filed against federal agencies, only against federal officers. *Id.* at 484-86.

Relying on *Franchise Tax Board*, *Loeffler*, and *Meyer*, Flamingo argues that the Postal Service's waiver of immunity reaches federal antitrust actions. We agree. In *Franchise Tax Board*, the Court held that the general liberal-construction rule can be overcome only if the Postal Service makes a clear showing that the type of suit filed against it is not consistent with the statutory or constitutional scheme, an implied restriction is necessary to avoid "grave interference

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[2] *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (recognizing an implied cause of action against federal officials who violate the Constitution).

with the performance of a governmental function," or Congress plainly intended to use "sue and be sued" in a narrow sense. *Franchise Tax Bd.*, 467 U.S. at 517-18 (quoting *Burr*, 309 U.S. at 245); *accord Loeffler*, 486 U.S. at 554-55. Here, the Postal Service does not "attempt to make the 'clear' showing of congressional purpose necessary to overcome the presumption that immunity [from federal antitrust actions] has been waived." *Meyer*, 510 U.S. at 481. Further, it is doubtful the Postal Service could make that showing: As was the case in *Loeffler*, "since Congress expressly included several narrow and specific limitations on the operation of the [Postal Service's] sue-and-be-sued clause, *see* 39 U.S.C. § 409, none of which is applicable here, the natural inference is that it did not intend other limitations to be implied." *Loeffler*, 486 U.S. at 557 (footnote omitted).

B

Having determined that Congress has waived the Postal Service's immunity, we turn to the second inquiry, "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Meyer*, 510 U.S. at 484. The source of substantive law upon which Flamingo relies is federal antitrust law. The Postal Service argues that a federal antitrust claim may not be pursued against it because it is not a "person" within the meaning of that law. We disagree. Although a federal sovereign is not a "person," the Postal Service is not a sovereign.

The rule that the federal government and its instrumentalities are not "persons" for federal antitrust law purposes dates back to *United States* v. *Cooper Corp.*, 312 U.S. 600, 61 S. Ct. 742, 85 L.Ed. 1071 (1941). In *Cooper*, the federal government attempted to bring a

civil suit under the Sherman Act. The Court rejected the suit, holding that the Sherman Act only allowed "persons" to bring civil suits and the United States did not meet the definition of a "person" under the Act. *Id.* at 604, 614. The Court explained that, "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *Id.* at 604. Although "there is no hard and fast rule of exclusion" of the sovereign from the word "person," *id.* at 604-05, the Court was concerned because the Sherman Act used the word "person" to describe both who could bring suit and who could be sued. The Court wanted to avoid interpreting "person" in a manner in which the United States could be sued. *Id.* at 606. Hence, the Court reasoned that "[t]he more natural inference . . . is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations." *Id.*

Later circuit court decisions extended *Cooper* to exclude federal instrumentalities from the meaning of the word "person" in federal antitrust laws. In the seminal case of *Sea-Land Service, Inc.* v. *Alaska Railroad*, 659 F.2d 243, 244 (D.C. Cir. 1981), then-Judge Ginsburg wrote for the court in holding that "Congress did not place the United States or its instrumentalities under the governance of the Sherman Act." The *Sea-Land Service* opinion relied on *Cooper*, and on Congress's decision after *Cooper* to amend some of the federal antitrust laws to allow the United States to bring civil actions for single, but not treble, damages. *Id.* at 245-46. This, the court reasoned, represented a Congressional intent to leave the word "persons" as the *Cooper* Court had defined it. *Id.* at 246.

In *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288-89 (9th Cir. 1985), we applied *Sea-Land Service* and held that federal instrumentalities are immune from antitrust liability. Because the defendant government of Guam was "an instrumentality of the federal government," we held "[t]here is no reason why Guam should enjoy less immunity than the federal government itself." *Id.* at 1289 (citing *Jet Courier Servs., Inc.* v. *Fed. Reserve Bank of Atlanta*, 713 F.2d 1221, 1228 (6th Cir. 1983), and *Sea-Land Serv.*, 659 F.2d at 246-47).

Cooper, *Sea-Land Service*, and *Sakamoto* remain valid precedent, but they do not control our decision today. These holdings require (or assume) that the federal instrumentality at issue enjoys federal sovereignty. As the Second Circuit recently explained: "[W]hile the *Sea-Land* court's holding that the Sherman Act does not expose federal agencies to legal or equitable liability for alleged antitrust violations . . . is uncontroversial, such immunity was founded on the sovereign immunity of the United States." *Name.-Space, Inc.* v. *Network Solutions, Inc.*, 202 F.3d 573, 580-81 (2d Cir. 2000) (citation omitted). Here, the Postal Service does not enjoy federal sovereignty.

The Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation. *See Franchise Tax Board*, 467 U.S. at 520 ("[W]e must presume that the Service's liability is the same as that of any other business."); *accord Loeffler*, 486 U.S. at 556 ("Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.'") (quoting *Shaw*, 478 U.S. at 317 n.5.); *see*

also Meyer, 510 U.S. at 482 (the Court has "looked to the liability of a private enterprise as a floor below which the [sue-and-be-sued] agency's liability could not fall."). Because the Postal Service is an entity with the status of a private commercial enterprise, it fits within the common meaning of the word "person," just as does any other private corporation. *See* 15 U.S.C. § 7 ("The word 'person,' or 'persons,' wherever used in [Title 15 of the United States Code] shall be deemed to include corporations . . . ."); *see also Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 782, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000) ("[T]he presumption with regard to corporations is just the opposite of the one governing [sovereigns]: they are presumptively covered by the term 'person' . . . .") (citing 1 U.S.C. § 1) (emphasis omitted).

We find support for our conclusion in *Global Mail Ltd.* v. *United States Postal Service*, 142 F.3d 208, 216-17 (4th Cir. 1998). There, the Fourth Circuit held that the Postal Service was a "person" that could be sued under the Lanham Act.[3] The court explained:

> [T]he Lanham Act itself contains no waiver of sovereign immunity for the federal government, and . . . the Act's definition of 'person' as an 'organization capable of being sued' falls short of the standard of explicitness required for such a waiver. But those agencies whose immunity has already been waived, and are capable of suing and being sued, fall squarely within the plain language of the Lanham

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[3] Since *Global Mail* was decided, the Lanham Act was amended to expressly cover the United States and its instrumentalities as "persons." *See* Pub.L. No. 106-43, §§ 4(c), 6(b), 113 Stat. 219, 220 (1999) (codified at 15 U.S.C. § 1127).

> Act's definition of 'juristic persons.' . . . [A] governmental agency engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association.'

Id. at 216;[4] *accord Fed. Express Corp.* v. *United States Postal Serv.*, 151 F.3d 536, 544-46 (6th Cir. 1998); *United States* v. *Q Int'l Courier, Inc.*, 131 F.3d 770, 775 (8th Cir. 1997). This reasoning applies equally here, where federal antitrust law defines "person" as including any private corporation, *see* 15 U.S.C. § 7, and where Supreme Court precedent establishes that the Postal Service is to be treated as a private corporation. *See Loeffler*, 486 U.S. at 556.

The Postal Service cites several cases involving sue-and-be-sued instrumentalities where such entities were held exempt from federal antitrust laws. *See Jet Courier Servs.*, 713 F.2d at 1228-29; *E.W. Wiggins Airways, Inc.* v. *Mass. Port Auth.*, 362 F.2d 52, 56 (1st Cir. 1966); *Webster County Coal Corp.* v. *Tenn. Valley Auth.*, 476 F. Supp. 529, 531-32 (W.D. Ky. 1979). These cases predate the Supreme Court's decisions in *Franchise Tax Board*, *Loeffler*, and *Meyer* and are not persuasive

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[4] The Postal Service points out that *Global Mail* holds that Lanham Act claims, which are federal tort claims, may be brought against the Postal Service. According to the Postal Service, this is contrary to the law of this circuit under *Pereira* v. *United States Postal Serv.*, 964 F.2d 873 (9th Cir. 1992). In *Pereira*, we held that the Postal Service is immune from suit for federal torts because the sue-and-be-sued clause is limited by the Federal Tort Claims Act (FTCA). *Id.* at 876-77. However, subsequent to *Pereira*, the Supreme Court held that the FTCA does not limit a sue-and-be-sued waiver as to federal tort claims because the FTCA only applies to state tort claims. *Meyer*, 510 U.S. at 476-79. This overruled *Pereira*.

authority in light of the Court's recent sue-and-be-sued jurisprudence.

We hold that the Postal Service can be sued under federal antitrust laws because Congress has stripped the Postal Service of its sovereign status by launching it into the commercial world as a sue-and-be-sued entity akin to a private corporation. However, we add one significant caveat. Two types of immunity from federal antitrust laws exist. Our discussion has focused solely on the first kind of immunity—"status-based" immunity, *see Name.Space*, 202 F.3d at 581—because the parties only raise that type of immunity. A second type of immunity—"conduct-based" immunity—can apply when an entity does not enjoy status-based immunity, but acts at the direction of a federal sovereign. *See id.* at 581-82 (holding that a nonsovereign contractor enjoyed immunity from antitrust law where it was exercising a Congressionally-mandated monopoly). Accordingly, our holding that the Postal Service does not enjoy status-based immunity does not prevent the Service from asserting conduct-based immunity if the action of the Postal Service being challenged was taken at the command of Congress. *See generally Air Courier Conf.* v. *Am. Postal Workers Union*, 498 U.S. 517, 519, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991) (recognizing that Congress has conferred a legal monopoly on the Postal Service over mail delivery in and from the United States).

II

THE PROCUREMENT MANUAL CLAIM

The Postal Service argues that the district court lacked jurisdiction over Flamingo's claim that it violated the Postal Service Procurement Manual because Flamingo lacks standing to assert the claim. The par-

ties' briefs devote much energy to an inconsistent series of cases from the 1970's to the 1990's discussing this issue. We need not attempt to reconcile these cases; they are irrelevant.

In 1996, Congress amended 28 U.S.C. § 1491, part of the codification of the Tucker Act, by enacting the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104-320, 110 Stat. 3870 (1996). The relevant portion of the ADRA, as codified, reads:

> Both the Unite[d] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(1). A sunset provision in the ADRA terminated district court jurisdiction under § 1491(b)(1) on January 1, 2001; however, a savings provision states that the termination of jurisdiction "shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000." ADRA, Pub. L. 104-320, § 12(d)-(e). Flamingo is within this savings clause because it filed its action on July 11, 2000. This being so, the questions presented are whether § 1491(b)(1) applies to the Postal Service, and if so, whether Flamingo has

standing to assert the Procurement Manual claim. At our request, the parties addressed these questions at oral argument.

Having considered the parties' arguments, we hold that § 1491(b)(1) applies to the Postal Service. In *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071, 1080-83 (Fed. Cir. 2001), the Federal Circuit held that the Postal Service could be sued under § 1491(b)(1). The court explained that, although Title 28 of the United States Code does not define "federal agency," it does define "agency" in a manner that covers the Postal Service. *Emery Worldwide Airlines*, 264 F.3d at 1080-81 (citing 28 U.S.C. § 451 and 39 U.S.C. § 201). We agree with the reasoning of *Emery Worldwide Airlines*, and follow its holding. [5]

We also hold that Flamingo has standing under § 1491(b)(1) to assert its Procurement Manual claim. Section 1491(b)(1) provides for district court jurisdiction over any claim by an "interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." Flamingo alleges that the Postal

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[5] 28 U.S.C. § 1491(b)(4) imports Administrative Procedures Act (APA) standards of review into procurement cases under 28 U.S.C. § 1491(b)(1). 39 U.S.C. § 410(a) exempts the Postal Service from most of the APA. In *Emery Worldwide Airlines*, the court noted the possibility that 28 U.S.C. § 1491(b)(4) and 39 U.S.C. § 410(a) are in conflict, although the court avoided deciding the issue. *See Emery Worldwide Airlines*, 264 F.3d at 1084-85. We do not see a conflict. 28 U.S.C. § 1491(b)(4) incorporates by reference the APA review standards into cases under 28 U.S.C. § 1491(b)(1); 28 U.S.C. § 1491(b)(4) does not create APA liability.

Service violated its Procurement Manual by maintaining contracts with Mexican suppliers of mail sacks that violated the Manual while unfairly canceling a procurement contract with Flamingo. Flamingo also alleges that the Postal Service violated the Manual by falsely declaring an emergency in the supply of mail sacks and failing to document this emergency so as to be able to award no-bid contracts to Mexican suppliers. Flamingo has standing under 28 U.S.C. § 1491(b)(1).

III

THE IMPLIED COVENANT CLAIM

The district court held that it lacked jurisdiction over Flamingo's claim for an alleged violation of the implied covenant of good faith and fair dealing because that claim was an unexhausted tort claim barred under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. The FTCA applies to the Postal Service, *see* 39 U.S.C. § 409(c), and Flamingo has never disputed that the claim is a tort claim covered by the FTCA. Under the FTCA, the claim had to be administratively exhausted for the court to have subject matter jurisdiction. *Jerves* v. *United States*, 966 F.2d 517, 518-19 (9th Cir. 1992); *see* 28 U.S.C. § 2675(a).

In determining that the claim was unexhausted, the district court considered a declaration submitted by the Postal Service and took note of Flamingo's failure to proffer contrary evidence. We therefore treat the court's dismissal of the claim as a grant of summary judgment, which we review de novo. *Lopez* v. *Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

The declaration submitted to the district court by the Postal Service demonstrated that Flamingo had not met the exhaustion requirement of the FTCA. Flamingo failed to present any evidence contradicting this declaration. We affirm the district court's dismissal of the claim.

IV

THE CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200 CLAIM

The Postal Service argues that the district court lacked supplemental jurisdiction over the California Business & Professions Code § 17200 claim and, alternatively, that the claim is preempted by federal law. We do not reach the issue of *supplemental* jurisdiction because we hold that the district court properly exercised *original* jurisdiction over this claim under 39 U.S.C. § 409(a). Nonetheless, the claim was properly dismissed because it is preempted by federal law.

A

We first consider the district court's jurisdiction. Subject to certain inapplicable exceptions, 39 U.S.C. § 409(a) provides that "the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." The plain language of this statute grants United States district courts original jurisdiction over lawsuits by or against the Postal Service, as other circuits have held. *E.g. Licata* v. *United States Postal Serv.*, 33 F.3d 259, 260-62 (3d Cir. 1994); *Cont'l Cablevision of St. Paul, Inc.* v. *United States Postal Serv.*, 945 F.2d 1434, 1437-41 (8th Cir. 1991); *Am. Postal Workers Union* v. *United States Postal Serv.*, 830 F.2d 294, 312 n.33 (D.C. Cir. 1987).

We would stop our discussion here, except for the need to clarify an arguable inconsistency in our cases interpreting 39 U.S.C. § 409(a). In *Janakes* v. *United*

States Postal Service, 768 F.2d 1091, 1093 (9th Cir. 1985), we quoted and adopted the Seventh Circuit's holding in *Peoples Gas, Light & Coke Co.* v. *United States Postal Service*, 658 F.2d 1182, 1189 (7th Cir. 1981), that § 409(a) "does not confer subject matter jurisdiction for actions in which the [Postal] Service is a party, but requires a 'substantive legal framework' of federal law to confer federal subject matter jurisdiction." According to *Peoples Gas* and *Janakes*, § 409(a) "merely removes the barriers of sovereign immunity." *Id.* Later, without citing *Janakes*, we held in *Wright* v. *United States Postal Service*, 29 F.3d 1426, 1430 (9th Cir. 1994), that "39 U.S.C. § 409(a) . . . grants the district courts original but not exclusive jurisdiction over actions by or against the USPS." *See also Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1035 & n.1 (9th Cir. 1991) (per curiam) (citing without discussion § 409(a) as a basis for jurisdiction).

A careful reading of our cases reveals that no true inconsistency exists because *Janakes* is distinguishable. In *Janakes*, the issue we decided was whether § 409(a) created a substantive right to bring suit. *See Janakes*, 768 F.2d at 1093. We held it did not. *Id.* Although some language in *Janakes* suggests that § 409(a) does not confer subject matter jurisdiction, that language is dicta. Indeed, the Seventh Circuit, which in *Peoples Gas* created the decision that prompted our *Janakes* language, later adopted a reading of *Peoples Gas* consistent with the reading we now apply to *Janakes*. *See Powers* v. *United States Postal Serv.*, 671 F.2d 1041, 1042 (7th Cir. 1982). We are satisfied that our reading, following *Wright*, is correct. The plain language of § 409(a) states that the district courts "shall have original jurisdiction"—the same words used to grant

jurisdiction elsewhere in the United States Code. *E.g.* 28 U.S.C. §§ 1331, 1332.

We hold that the district court correctly exercised original subject matter jurisdiction under 39 U.S.C. § 409(a) over Flamingo's claim asserted under California Business & Professions Code § 17200.

B

The district court's dismissal of the California Business & Professions Code § 17200 claim was proper, however, because that claim is preempted by federal law. The district court did not reach this issue, but we may affirm on any ground supported by the record. *See Laboa* v. *Calderon*, 224 F.3d 972, 981 n. 7 (9th Cir. 2000).

Preemption comes in several forms. Here we are concerned with conflict preemption, by which "state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' . . . , or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), and *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

The state law at issue, California Business & Professions Code § 17200, is a notoriously broad statute. It applies to, among other things, "any unlawful, unfair or fraudulent business act or practice." Here, Flamingo is using the section to challenge procurement decisions

made by the Postal Service involving the Postal Service's requirements for mail bags. This use of section 17200 conflicts with federal law.

The Postal Service is expressly authorized by 39 U.S.C. § 401(3) to determine the character and necessity of its expenditures. And, although 28 U.S.C. § 1491(b)(1) allows for challenges to Postal Service procurement decisions, 28 U.S.C. § 1491(b)(4) provides that such decisions may only be invalidated by a federal court applying the deferential APA standard of review codified at 5 U.S.C. § 706 (for example, if the procurement decision is arbitrary and capricious). Allowing the requirements of California Business & Professions Code § 17200 to control the Postal Service's procurement decisions would impinge upon the Service's right to control the character and necessity of its purchases free from state constraint, and would negate the deferential standard Congress has created for federal court review of such decisions. *Cf. United States* v. *City of Pittsburg, Cal.*, 661 F.2d 783, 785-86 (9th Cir. 1981) (holding that a local ordinance requiring letter carriers to obtain consent before crossing lawns was preempted by a Postal Service regulation allowing mail carriers to cross lawns unless the owner objects because of the clear conflict between the two provisions). Flamingo's claim asserted under California Business & Professions Code § 17200 is preempted by federal law.

V

THE § 1983 CLAIM

The Postal Service argues that we should dismiss Flamingo's 42 U.S.C. § 1983 claim for failure to state a claim upon which relief can be granted. We agree. The Postal Service acts under federal law, and § 1983 does not allow for a suit based upon actions taken under

color of federal law. *Billings* v. *United States*, 57 F.3d 797, 801 (9th Cir. 1995). Exercising our authority to affirm on any ground supported by the record, we dismiss with prejudice the § 1983 claim.

VI

VENUE

The district court, after dismissing the federal antitrust claims and the breach of implied covenant claim, dismissed the Procurement Manual, California Business and Professions Code § 17200, and 42 U.S.C. § 1983 claims for improper venue. It held that 15 U.S.C. § 22 did not support venue for these claims once the antitrust claims were dismissed.

Section 22 states:

> Any suit, action, or proceeding *under the antitrust laws* against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22 (emphasis added).

We have held earlier in this opinion that the district court erred in dismissing the antitrust claims on the ground of sovereign immunity. We now hold that under 15 U.S.C. § 22, venue for the antitrust claims was proper in the Northern District of California because the Postal Service may be found in, and transacts business in, that district. *See id.*

Because venue is proper in the Northern District of California for the antitrust claims, and because the Procurement Manual, § 17200, and § 1983 claims arise out

of the same common nucleus of facts, venue in the Northern District was proper for these claims as well. *See Beattie* v. *United States*, 756 F.2d 91, 100-104 (D.C. Cir. 1984), *overruled on other grounds in Smith* v. *United States*, 507 U.S. 197, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993); *Seattle Audubon Soc'y* v. *Lyons*, 871 F. Supp. 1286, 1290 (W.D. Wash. 1994). However, for alternative reasons previously discussed, we have affirmed the dismissal of the § 17200 and § 1983 claims. We now reverse the district court's dismissal of the Procurement Manual claim for improper venue.

VII

CONCLUSION

We reverse the district court's dismissal of Flamingo's antitrust claims and Procurement Manual claim. We affirm the district court's dismissal of Flamingo's claim for breach of the implied covenant of good faith and fair dealing, and its dismissal of the claims asserted under California Business & Professions Code § 17200 and 42 U.S.C. § 1983. The parties shall each bear their respective costs for this appeal.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 00-2484 MMC

FLAMINGO INDUSTRIES (U.S.A.), LTD., AND ARTHUR WAN, PLAINTIFFS

v.

U.S. POSTAL SERVICE, ET AL., DEFENDANTS

[Filed: March 19, 2001]

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; VACATING HEARING

Before the Court is defendant United States Postal Service's motion to dismiss or, in the alternative, for summary judgment. Having considered the papers submitted in support of and in opposition to the motion, the Court deems the matter appropriate for decision on the papers, VACATES the hearing scheduled for March 16, 2000 and rules as follows.

A. Antitrust Claims

Defendant argues plaintiffs cannot state a claim against it under the antitrust laws. Federal instrumentalities are not liable under the antitrust laws. *See Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285,

1288 (9th Cir. 1985); *Sea-Land Service, Inc.* v. *Alaska Railroad*, 659 F.2d 243, 246 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982). Defendant is an instrumentality of the federal government. *See Silver* v. *United States Postal Service*, 951 F.2d 1033, 1035 (9th Cir. 1991). While the "sue and be sued" clause set forth in 39 U.S.C. § 401(1) constitutes a general waiver of sovereign immunity, *see Pereira* v. *United States Postal Service*, 964 F.2d 873, 876 (9th Cir. 1992), such language cannot serve to subject defendant to liability under the antitrust laws as "there was no attempt on the part of Congress to impose liability in the first place." *See E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52, 56 (1st Cir.), cert. denied, 385 U.S. 947 (1966) (holding "sue and be sued" clause in statute creating Massachusetts Port Authority did not subject it to antitrust laws). Accordingly, defendant's motion to dismiss Counts One through Five (antitrust claims) for failure to state a claim is hereby GRANTED.

B. Non-Antitrust Claims

With respect to the non-antitrust claims, defendant raises challenges under Rules 12(b)(1), 12(b)(3), 12(b)(6) and 56 of the Federal Rules of Civil Procedure. The Court will consider the jurisdictional and venue challenges under Rules 12(b)(1) and 12(b)(3), respectively, before addressing the merits of plaintiff's claims under Rules 12(b)(6) and 56. *See Arrowsmith* v. *United Press Int'l*, 320 F.2d 219, 221 (2nd Cir. 1963) (holding district court erred in dismissing action for failure to state a claim prior to addressing issues of jurisdiction and venue).

1. Jurisdiction

Defendant does not challenge the Court's jurisdiction as to Count Nine (42 U.S.C. § 1983). Defendant does challenge the Court's jurisdiction as to Counts Six (California Business & Professions Code § 17200), Seven (violation of procurement manual), and Eight (breach of implied covenant of good faith and fair dealing).

The Court has jurisdiction over Counts Six and Seven. *See* 39 U.S.C. § 409(a) (providing district courts with original jurisdiction over all actions brought by or against the Postal Service); *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 514-515 (1984) (addressing claim brought against Postal Service under state tax laws, where federal jurisdiction invoked pursuant to § 409(a)). Accordingly, defendants' motion to dismiss Counts Six and Seven for lack of jurisdiction is hereby DENIED.

With respect to Count Eight, defendant interprets the claim as one by which plaintiffs seek tort remedies, and plaintiffs make no argument to the contrary. The Federal Torts Claim Act ("FTCA") applies "to tort claims arising out of the activities of the Postal Service." *See* 39 U.S.C. § 409(c). Exhaustion of administrative remedies under the FTCA is a jurisdictional prerequisite to suit. *See Jerves* v. *United States*, 966 F.2d 517, 518-519 (9th Cir. 1992). "A tort claimant may not commence proceedings in court against the United States without first filing [a] claim with the appropriate federal agency and either receiving a conclusive denial of the claim from the agency or waiting for six months to elapse without a final disposition of the claim being made." *Id.* at 519. Plaintiffs have not alleged such exhaustion, and leave to amend would be futile because

plaintiffs do not dispute defendant's evidence as to lack of exhaustion, (*see* Eaves Decl. at ¶¶ 2-4), and further state "no claim was required to be submitted by the plaintiffs." (*See* Pls. Opp. at 14:19.) Accordingly, defendant's motion to dismiss Count Eight for lack of jurisdiction is hereby GRANTED.

2. Venue

As to the remaining non-antitrust claims, Counts Six, Seven, and Nine, venue is proper in this district only if plaintiffs establish that "a substantial part of the events or omissions giving rise to the claim occurred" in the Northern District of California. *See* 28 U.S.C. § 1391(e)(2).[1] In their opposition, plaintiffs do not discuss how they can establish venue under § 1391(e)(2), and instead rely exclusively on 15 U.S.C. § 22, which addresses venues for antitrust claims.[2] Plaintiffs' antitrust claims, however, have been dismissed. Accordingly, defendant's motion to dismiss Counts Six, Seven, and Nine for improper venue is hereby GRANTED.

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[1] Because defendant is a resident of the District of Columbia, *see* 39 C.F.R. § 2.3, and plaintiffs allege they are residents of Illinois, (*see* Compl. at ¶¶ 2, 3), venue is not proper under either 28 U.S.C. § 1391(e)(1) or (e)(3).

[2] Moreover, neither the allegations in the complaint nor the evidence before the Court suggests venue is proper in this district under § 1391(e). Plaintiffs challenge decisions made by defendant's agents in the District of Columbia, (*see* Wan Decl. Ex. A-H), specifically, decisions to terminate Flamingo's contracts with defendant and to prevent Flamingo from prevailing on subsequent bids. (*See, e.g.*, Compl. at ¶¶ 16, 20-29.) Plaintiffs allege these decisions violated the non-antitrust federal and state laws in question. (*See id.* at ¶¶ 51-73).

CONCLUSION

For the reasons stated, defendant's motion to dismiss in GRANTED.

The Clerk shall close the file.

IT IS SO ORDERED.

/s/ MAXINE M. CHESNEY
MAXINE M. CHESNEY
United States District Judge

Dated: March 19, 2001

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15963

D.C. No. C00-2484 MMC

FLAMINGO INDUSTRIES (USA) LTD. AND ARTHUR WAH, PLAINTIFFS-APPELLANTS

v.

UNITED STATES POSTAL SERVICE, DEFENDANT-APPELLEE

[Filed: Nov. 4, 2002]

ORDER

Before: LAY,* THOMPSON, and TALLMAN, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellee United States Postal Service's petition for rehearing. Judge Tallman has also voted to deny its petition for rehearing by the court en banc, and Judges Lay and Thompson have recommended that that petition be denied.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

APPENDIX D

1. 15 U.S.C. 7 provides:

§ 7. "Person" or "persons" defined

The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

2. 15 U.S.C. 12(a) provides:

§ 12. Definitions; short title

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States,

or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

* * * * *

3. 39 U.S.C. 101 provides:

§ 101. Postal policy

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices

are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.

(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working

conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

4. 39 U.S.C. 201 provides:

§ 201. United States Postal Service

There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.

5. 39 U.S.C. 401 provides:

§ 401. General powers of the Postal Service

The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name;

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

(3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures;

(4) to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents, except as otherwise provided in this title;

(5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest

therein; and to provide services in connection therewith and charges therefor;

(6) to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it, including, without limitation, any property or interest therein transferred to it under section 2002 of this title;

(7) to accept gifts or donations of services or property, real or personal, as it deems, necessary or convenient in the transaction of its business;

(8) to settle and compromise claims by or against it;

(9) to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes; and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates; and

(10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

Supreme Court, U.S.
FILED
APR 23 2003
OFFICE OF THE CLERK

No. 02-1290

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal entity whose immunity has been waived by Congress can be sued as a "person" under the federal antitrust laws given that "person" includes "corporations and associations existing under or authorized by the laws of . . . the United States," 15 U.S.C. § 7 (2003), and that this Court previously has held that foreign, state, and local governments fall within the statutory definition of "person" under the antitrust laws?

CORPORATE DISCLOSURE STATEMENT

Respondent, Flamingo Industries (U.S.A.) Ltd. does not have a parent company and there is no parent or publicly held company owning 10% or more of the corporation's stock.

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STATEMENT

Flamingo Industries and its owner, Arthur Wah, (collectively "Flamingo") filed suit against the Postal Service for antitrust and other injuries stemming from the Postal Service's termination of a contract with Flamingo to produce U.S. mail sacks. Plaintiffs alleged that the Postal Service attempted to suppress competition and create a monopoly in mail sack production by procuring cheaper mail sacks manufactured in Mexico. The district court granted the Postal Service's motion to dismiss, reasoning in relevant part that Congress did not intend to impose antitrust liability on the Postal Service. Pet. App. 23a-24a.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the federal antitrust laws apply to federal entities whose immunity has been waived by Congress: "Because the Postal Service is an entity with the status of a private commercial enterprise, it fits within the common meaning of the word 'person,' . . . wherever used in [Title 15 of the United States Code]." Pet. App. 11a. Indeed, the court noted that "[t]he Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." Pet. App. 10a. The court stated that the Postal Service nonetheless could assert "conduct-based" immunity from antitrust liability if it acted "at the direction of a federal sovereign." Pet. App. 13a.

ARGUMENT

Petitioner Postal Service contends that Congress, by waiving the Postal Service's sovereign immunity under the Postal Service Reorganization Act (PRA), intended the Postal Service nonetheless to remain immune from the reach of the Sherman Act. It argues that the court of appeals's decision below conflicts with this Court's decisions in United States v. Cooper Corp., 312 U.S. 600 (1941), and FDIC v. Meyer, 510 U.S. 471 (1994), as well as with various decisions of the courts of appeals. Moreover, it charges that allowing the Postal Service to be sued under the antitrust laws will expose the Postal Service to unwarranted damages, which could undermine its mission to deliver mail service at reasonable rates.

Petitioner's arguments are unpersuasive for a number of reasons. First, petitioner's efforts to depict a conflict with this Court's prior decisions and those from the courts of appeals are miscast. Second, petitioner's policy arguments against additional liability cannot be reconciled with Congress's very premise in waiving the Postal Service's immunity. Finally, there is no need for this Court to resolve the Sherman Act question at the present time – the court of appeals adopted a conduct-based immunity test to protect the Postal Service from Sherman Act liability if its acts stem from a Congressional mandate; the Postal Service ultimately may escape all liability in the trial court; and even if the Postal Service is held liable, it can seek this Court's review at that time.

1. The decision below is consistent with United States v. Cooper Corp., FDIC v. Meyer, and with prior courts of appeals's decisions.

This Court in Cooper held that Congress did not intend to include the United States within the term "person" as used in the antitrust laws. 312 U.S. at 606. Rather, "in common usage, the term 'person' does not include the sovereign." Id. at 604. This Court went on to note that in each place in the statute where the term "person" is used,

"it is obvious that while the term 'person' may well include a corporation, it cannot embrace the United States." Id. at 607. Courts of appeals, accordingly, have held that federal agencies also do not fall within the statutory term "person." See Sea-Land Serv. Inc. v. Alaska R.R., 659 F.2d 243 (D.C. Cir. 1981) (Alaska Railroad and its supervising United States agencies); Jet Courier Servs., Inc. v. F. Reserve Bank of Atlanta, 713 F.2d 1221 (6th Cir. 1983) (Federal Reserve Banks); Rex Sys., Inc. v. Holiday, 814 F.2d 994 (4th Cir. 1987) (Department of the Navy); Greenwood Utils. Commn. v. Miss. Power Co., 751 F.2d 1484 (5th Cir. 1985) (Southeastern Power Administration); Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 632 F.2d 680 (7th Cir. 1980) (Army and Air Force Exchange Service).[1]

This Court, however, has never held that the statutory term "person" excludes government entities that Congress has determined can "sue and be sued" just like any "corporation[] and association[] existing under or authorized by the laws of . . . the United States." 15 U.S.C. § 7. Indeed, Congress intended in the PRA to place the Postal Service on an equal footing with private corporations and associations, and the language of the Sherman Act covers "corporations and associations existing under or authorized by the laws of . . . the United States." Id.

The court of appeals's commonsense decision below that a governmental entity that Congress has determined can sue and be sued falls within the Sherman Act's definition of "person" in no way conflicts with Cooper. In addition, the court's decision below creates no split within the circuits. Petitioner cited no court of appeals

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[1]Petitioner also argues that a conflict arises with the appellate decisions in Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573 (2d Cir. 2000), and in Greenwood Utils. Commn., 751 F.2d 1484. Pet. App. 10. In neither case, however, was the immunity of a federal instrumentality at stake. Rather, the question was whether a private entity could claim immunity because it was acting on behalf of the sovereign.

decisions that held the Postal Service immune from suit under the antitrust laws. Moreover, no court of appeals has held that the statutory definition of "person" excludes all governmental entities that can sue and be sued.

To be sure, a number of courts of appeals have held that governmental instrumentalities do not fall within the statutory term "person." For instance, the D.C. Circuit in Sea-Land reasoned that there was no evidence that Congress intended to treat government agencies or instrumentalities, such as the Alaska Railroad and its supervising federal agencies in that case, any differently from the United States itself. 659 F.2d at 246. No lower court, however, has focused on (or even discussed) whether a governmental entity that Congress has determined can sue and be sued should similarly be immune from suit or rather should be considered a corporation or association "existing under or authorized by the laws of . . . the United States." 15 U.S.C. § 7.[2]

To the contrary, this Court has directed that the statutory terms "corporation[]" and "association[]" be construed broadly. In Pfizer v. Government of India, this Court held that the term "person" as defined under the Sherman Act included a foreign nation and therefore permitted the Government of India to maintain a suit. 434 U.S. 308 (1978). This Court noted that "Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning," and that "the Sherman and Clayton Acts did not create a 'hard and fast rule of exclusion' of governmental bodies." Id. at 312, 316 (citation omitted). This Court has further held that states must be considered

[2] Of the decisions raised by petitioner, only Jet Courier involved a governmental entity, the Federal Reserve Bank, that Congress had determined could sue and be sued. Significantly, the plaintiff in that case apparently did not argue that Congress's waiver of the Federal Reserve Bank's immunity suggested that Congress would have intended the Federal Reserve Bank to be considered a "person" within the meaning of the Sherman Act. 713 F.2d 1221.

persons, e.g. Georgia v. Evans, 316 U.S. 159, 162-163 (1942), as must municipalities, e.g. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396 (1906).[3] And, this Court in Cooper stressed that "person" should be construed the same whether the government sues as a plaintiff or is sued as a defendant: "It is hardly credible that Congress used the term 'person' in different senses in the same sentence." 312 U.S. at 606. The statutory term "person," therefore, comfortably covers a governmental entity whose immunity has been waived by Congress.

Viewed another way, Cooper instructs that "person" does not include the sovereign because courts will not conclude that Congress has waived sovereign immunity unless it does so specifically. Once unmistakable evidence of a waiver exists, however, there is no longer any reason to construe "person" unnaturally to exclude governmental entities. This Court has counseled "that such sue-and-be-sued waivers are to be 'liberally construed,' notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." Meyer, 510 U.S. at 480 (citation omitted). If "person" covers foreign governments, state governments, and municipalities, then it includes federal governmental entities that Congress has directed can sue and be sued. No conflict with Cooper exists.

Petitioner's argument that the court's decision below conflicts as well with Meyer is even more strained. This Court in Meyer held that Congress's decision to waive the immunity of a governmental instrumentality, **in that case the Federal Savings and Loan Insurance Corporation**, did not automatically expose that agency to Bivens v. Six Unknown Named F. Narcotics Agents, 403 U.S. 388 (1971) claims. Meyer, 510 U.S. at 472. Rather, a court must

[3] The Court has also determined that a labor union falls within the statutory term "person." United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922).

determine "whether the source of substantive law upon which the claimant relies provides an avenue for relief." 510 U.S. at 484.

Unlike in Meyer, in the instant case "the source of substantive law upon which the claimant relies," the Sherman Act, plainly affords respondents a cognizable cause of action. Id. As long as the Sherman Act includes governmental entities for which Congress has waived immunity, then the approach dictated in Meyer is satisfied. As the court of appeals stated: "The source of substantive law upon which Flamingo relies is federal antitrust law." Pet. App. 8a. Thus, petitioner's assertion that the court of appeals's decision is inconsistent with Meyer is unpersuasive – the key question rather, is whether a governmental entity for which Congress waived immunity falls within the statutory definition of "person."

2. The court below persuasively determined that "person" in the Sherman Act includes governmental entities that Congress determined can sue and be sued.

The court of appeals as a matter of first impression correctly decided that Congress intended "person" in the Sherman Act to include an entity for which Congress has waived its immunity. Given that Congress explicitly decided to include corporations and associations within the ambit of 15 U.S.C. § 7, it logically intended governmental entities that can sue and be sued generally to stand on the same footing as these private entities.

The court of appeals persuasively relied upon Franchise Tax Bd. of Cal. v. United States Postal Service, 467 U.S. 512 (1984), and Loeffler v. Frank, 486 U.S. 549 (1988), for its conclusion. In Franchise Tax Bd., this Court held that Congress waived the Postal Service's immunity from state administrative orders to withhold monies that its employees owed to the state taxing authority. 467 U.S. 512. Citing FHA, Region No.4 v. Burr, 309 U.S. 242 (1940), this Court explained that

> [w]e start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. . . . [W]hen Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied.

467 U.S. at 517. Indeed, apparently there was no dispute that the Postal Service fell within the statutory term "person" under the California Unemployment Insurance Code. See id. at 522.

In reaching its decision, this Court specifically noted that Congress in passing the PRA "indicated that it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." Id. at 519-520. This Court stressed that "we must presume that the Service's liability is the same as that of any other business." Id. at 520. As the Fourth Circuit later stated in Global Mail Ltd. v. United States Postal Service, "the language and the legislative history of the PRA make clear that Congress intended USPS to be a full-fledged competitor in the business of carrying letters, parcels and packages, and USPS has fulfilled that intention by competing head-to-head with a host of private courier services." 142 F.3d 208, 215 (1998). Given Congress's overall intent to create parity between the Postal Service and other businesses, it would be incongruous to conclude that Congress wished to launch the Postal Service into competition with entities such as Federal Express or United Parcel Service ("UPS") with respect to express mail and other services, and yet immunize the Postal Service from the same antitrust constraints that promote competition amongst its competitors. Nor is it likely that the Postal Service's liability would be "the same as that of any other business" if it could conspire to set prices or engage in other means of restraining competition without fear of the antitrust laws. Franchise Tax Bd., 467 U.S. at 512. Thus, this Court's admonition in Franchise Tax Bd. that "we believe Congress intended

the Postal Service to be treated similarly to other self-sustaining commercial ventures" holds true here as well. Id. at 525-526.

This Court's decision in Loeffler stands for the same proposition. There, in upholding an award of pre-judgment interest against the Postal Service in a Title VII case, this Court added an additional argument as to why the PRA should be construed to have effected a broad waiver of immunity. This Court pointed to the specific exceptions that Congress had grafted on to the sue-and-be-sued clause to limit the Postal Service's liability. Loeffler, 486 U.S. at 561-562. For instance, section 409 of the PRA provides that "the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States" is involved should also apply in suits against the Postal Service despite the general waiver. Moreover, Congress directed that tort claims be brought against the Postal Service in conformance with the procedures and limitations set out under the Federal Tort Claims Act, irrespective of the sue-and-be-sued clause. Id. When Congress, therefore, wanted to ensure continued limited liability for the Postal Service, it was careful to carve out explicit exceptions. In light of the special rules governing venue, tort claims, and the like, the lack of any reference to the Sherman Act strongly suggests that no such limitation to the general waiver was intended. Congress rather "intended the Postal Service to be treated similarly to other self-sustaining commercial ventures" and subject to the antitrust provisions of the Sherman Act. Franchise Tax Bd., 467 U.S. at 525.

Prior to the PRA, Congress passed a multitude of statutes imposing new responsibilities and liabilities on individuals, corporations, and other entities. Some, like the Sherman Act, direct that all "persons" be liable, including corporations organized under the laws of the United States. Others designate a more discrete set of defendants. In enacting the broad waiver in the PRA, it would have been impracticable for Congress to scrutinize the language in the countless statutes and specify whether the Postal Service should be

subject to suit in each one. That is why this Court previously has counseled that

> if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense.

Loeffler, 486 U.S. at 554 (quoting FHA, 309 U.S. at 245).

No such reasons for caution even have been suggested here. Preventing the Postal Service from anti-competitive behavior would further, not hinder, Congress's intent that the Postal Service compete on an equal footing with entities such as Federal Express and UPS. Moreover, there has been no showing that imposing anti-competitive restraints would lead to "grave interference with the performance of a governmental function." Id. As further noted below, the court of appeals was careful to state that the Postal Service would still enjoy immunity from antitrust claims where anti-competitive behavior stemmed from legislative direction, as for the monopoly on the carriage of U.S. mail. Pet. App. 13a.

Indeed, far from creating a split among the circuits, the Ninth Circuit's decision is consistent with prior appellate decisions addressing the status of governmental entities that Congress has directed can sue and be sued. For instance, in Global Mail, the Postal Service argued, much as it does here in the context of the antitrust laws, that the Lanham Act did not reach the Postal Service's conduct, despite the PRA's sue-and-be-sued clause. 142 F.3d 208. At that time, the Lanham Act permitted suit against all "persons" including

"organizations capable of being sued." 15 U.S.C. § 1127.[4] The Postal Service asserted that the Lanham Act did not allow suit against it because "the Act's definition of 'person' as an 'organization capable of being sued' falls short of the standard of explicitness required for such a waiver." Global Mail, 142 F.3d at 216. But the Fourth Circuit rejected that argument, reasoning "that a federal agency whose sovereign immunity has been waived . . . [and is] engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association.'" Id. The Sixth Circuit subsequently agreed with that reasoning, adding "[w]e cannot conclude that Congress intended § 409(c) simultaneously to 'launch [USPS] into the commercial world' and also to immunize USPS from liability for federally-created commercial torts such as the Lanham Act." F. Express Corp. v. U.S. Postal Serv., 151 F.3d 536, 543 (1998) (citation omitted in original). Such a reading would be wholly inconsistent with Congress's stated purpose in enacting the PRA. See also U.S. v. Q Intl. Courier, Inc., 131 F.3d 770, 775 (8th Cir. 1997). Congress's waiver in the PRA was intended to subject the Postal Service to the same rules of the game played by its competitors.

In short, the court of appeals below persuasively concluded that Congress intended that the Postal Service be amenable to suit under the Sherman Act, just like its competitors. The broad language of the waiver in the PRA, Congress's care in crafting exceptions to the waiver, Congress's underlying intent, and the language of the Sherman Act all support that conclusion.

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[4]The Lanham Act since has been amended to codify Global Mail and include the United States specifically within terms of the statute. 15 U.S.C. § 1127 (2003). Petitioner's citation to the Lanham Act reflects the amended version. Pet. App. 6.

3. This court may await further developments in the courts of appeals before deciding whether to resolve this issue given that there is no split among the courts of appeals and no tangible harm to petitioner.

Finally, this Court need not resolve the Sherman Act issue at the present time for three reasons. First, the court below recognized that the Postal Service would continue to be protected by a "conduct-based immunity." Pet. App. 13a. According to the court, the Postal Service cannot be sued for carrying out its legislative mandate, but only for acts contrary to legislative will that are anti-competitive. When the Postal Service exercises a monopoly authorized by Congress, no liability can lie. However, if, for example, the Postal Service conspires with UPS to hold down prices on next day mail, creates an illegal tying arrangement, or conspires to prevent competition in production of mail sacks in the absence of Congressional authorization, then no immunity would attach. Liability in such contexts would protect the public and further Congress's goal in the PRA to make the Postal Service more efficient. Consequently, petitioner's assertion that the court's decision "could undermine the ability of the Postal Service to carry out its legislative mandate" is unfounded, Pet. App. 5, for the court's decision below may, in fact, enhance the Postal Service's responsiveness to Congressional will. Petitioner argues nonetheless that the conduct-based immunity might be too porous to protect its interests. Petitioner's speculation is just that – the Ninth Circuit may well apply the conduct-based immunity in a way entirely solicitous of the Postal Service's legitimate interests. This Court has applied a conduct-based immunity in the past to ensure that legislatively-directed conduct is protected. Cf. Parker v. Brown, 317 U.S. 341 (1943).

Second, no award has been made against the Postal Service in this case. The Postal Service may well prevail at trial, obviating this Court's need to resolve the statutory construction issue at this time.

Third, even if respondents prevail, the Postal Service could re-file a petition for certiorari and, at that time, the Ninth Circuit's application of conduct-based immunity would be more ripe for review. Given that there has been no damages award against the Postal Service and given that there is no split in the circuits, this Court should await further developments in the lower courts before determining whether to resolve the statutory construction issue posed here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Ninth Circuit's holding that the Postal Service is amenable to suit under the antitrust laws violates two established principles of this Court's jurisprudence and conflicts with the decisions of lower courts. First, the court of appeals' decision conflicts with *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), and an unbroken line of lower court precedent beginning with *Sea-Land Service, Inc.* v. *Alaska Railroad*, 659 F.2d 243, 245 (D.C. Cir. 1981) (R.B. Ginsburg, J.), cert. denied, 455 U.S. 919 (1982), holding that the United States and its agencies and instrumentalities are not "persons" subject to liability under the antitrust laws. Second, the court of appeals' decision conflicts with the holding of *FDIC* v. *Meyer*, 510 U.S. 471 (1994), that a waiver of sovereign immunity is insufficient to impose substantive liability on a federal agency, as well as with the decisions of lower courts that have specifically held that the Postal Service's sue-and-be-sued clause is not basis for creating liability against the Postal Service. The court of appeals' unprecedented decision in this case will have an immediate and detrimental impact on the ongoing operations of the Postal Service. Review by this Court is therefore warranted.

1. The Ninth Circuit's Decision Conflicts With *United States* v. *Cooper* And Lower Court Decisions Holding That Agencies And Instrumentalities Of The United States Are Not "Persons" Under The Antitrust Laws

a. This Court held in *Cooper*, 312 U.S. at 606-608, that the term "person" in the Sherman Act, 15 U.S.C. 7, does not include the United States. Respondents do not dispute that the holding in *Cooper* applies with equal force to agencies and instrumentalities of the United States (see Pet. 6-7) or that the Postal Service is a quintessential agency or instrumentality of the United States (see Pet. 7-9). Rather, respondents argue that a "person" includes any federal agency and instrumentality for which Congress has waived sovereign immunity, because such an entity "can 'sue and be sued' just like any 'corporation[] and association[]'" that is expressly covered by the Sherman Act, and therefore "should be considered a corporation or association 'existing under or authorized by the laws of . . . the United States.'" Br. in Opp. 3-4 (quoting 15 U.S.C. 7). There are two fundamental flaws in this reasoning.

First, the Court's holding in *Cooper* was unqualified. The Court held that the United States is not a "person" entitled to sue for treble damages when it acts as a purchaser because, *inter alia*, "person" has the same meaning for the United States whether referring to a Sherman Act plaintiff or defendant, and Congress did not intend that the United States "would be liable to suit for treble damages" under the Act. 312 U.S. at 606. Indeed, respondents' attempt to limit *Cooper* to instances in which the United States has not consented *to be sued* is disconnected from the Court's specific holding in *Cooper* that the United States may not *bring suit* as a Sherman Act plaintiff. As the Court recognized, "[t]he United States is a juristic person in the sense that it has capacity to sue." *Id.* at 604. The Court nonetheless held that Congress did not intend the United States to be included as a "person" that is entitled to sue for damages

under the antitrust laws. *Id.* at 606. It follows that the United States (or one of its agencies or instrumentalities) likewise is not a "person" that is subject to a suit for treble damages under the antitrust laws even if it has the general capacity to *be* sued.*

Second, contrary to respondents' assertion, the Postal Service is not a "corporation," "association," or other private entity. See Pet. 7-8. Rather, postal services have always been carried out by the Executive Branch of the United States Government. Act of Sept. 22, 1789, ch. 16, 1 Stat. 70; Act of June 8, 1872, ch. 335, 17 Stat. 283. Congress carried forward that tradition in the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719, by creating the Postal Service as "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. To ensure that postal services would be "provided to the people by the Government of the United States," 39 U.S.C. 101(a), Congress mandated that the Postal Service be comprised of governmental officers and employees, 39 U.S.C. 202, 205(d), 410, 1001, 1011, and granted the Postal Service uniquely sovereign powers, including the right of eminent domain in the name of the United States, 39 U.S.C. 401(9), the right to negotiate international postal treaties and conventions,

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* Respondents err in attempting (Br. in Opp. 4-5) to draw support from this Court's decisions that have recognized that the term "person" may include governmental bodies *other than the United States*, such as foreign countries, States, and municipalities. In *Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978), and *Georgia* v. *Evans*, 316 U.S. 159 (1942), the Court held only that a foreign nation and a State may sue *as a plaintiff*, not that they are subject to the substantive standards and treble-damage provisions of the antitrust laws as defendants, and those decisions reaffirm *Cooper*'s holding that the United States is not a "person" under the antitrust laws, 434 U.S. at 316-317; 316 U.S. at 161-162. Cases involving municipalities are even further afield, for municipalities do not have the same sovereign status as States. See, *e.g.*, *Jinks* v. *Richland County*, No. 02-258 (Apr. 22, 2003), slip op. 9-10.

39 U.S.C. 407, and the right to borrow on the United States' full faith and credit, 39 U.S.C. 2006(c).

Nothing in Congress's waiver of sovereign immunity in the sue-and-be-sued clause of 39 U.S.C. 401(1) alters the fundamental sovereign character of the Postal Service. Indeed, the waiver itself presupposes that the Postal Service *is* part of the sovereign. Respondents' position is thus contrary to this country's long history of treating postal services as "a sovereign function" and "a sovereign necessity," *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981), as well as the numerous current provisions in Title 39 that explicitly refer to and treat the Postal Service as an arm of the United States.

b. The Ninth Circuit's decision represents the first appellate decision to hold that a federal agency or instrumentality is a "person" within the meaning of the antitrust laws. That decision departs from many lower courts decisions that have addressed the issue and uniformly held that agencies and instrumentalities of the United States are not "persons" subject to the substantive restrictions and treble damage provisions of the antitrust laws. Pet. 9-11.

Respondents argue (Br. in Opp. 4) that none of those decisions explicitly addressed whether the Sherman Act extends to a federal agency or instrumentality that Congress has determined can sue and be sued. Contrary to respondents' assertion, however, the D.C. Circuit's seminal decision in *Sea-Land Service* explicitly *did* address the issue of whether the antitrust laws apply to United States agencies and instrumentalities where Congress has waived sovereign immunity. The court recognized that the Administrative Procedure Act, 5 U.S.C. 702, had "eliminate[d] the defense of sovereign immunity in actions for specific, nonmonetary relief," and the court accordingly observed that, "[w]ere sovereign immunity our sole concern, * * * we would hold the named United States agencies and officials answerable in this action." 659 F.2d at 244-245. The court nonetheless held

that the antitrust laws "do[] not expose United States instrumentalities to liability." *Id.* at 245.

Furthermore, in *Jet Courier Services, Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221, 1228 (1983), the Sixth Circuit held that the antitrust laws do not apply to a Federal Reserve Bank, which may "sue and be sued" under 12 U.S.C. 341. Although the Sixth Circuit did not discuss Congress's waiver of the Federal Reserve Bank's sovereign immunity in 12 U.S.C. 341, the Ninth Circuit's holding cannot be reconciled with the result reached in *Jet Courier*.

2. The Ninth Circuit's Decision Conflicts With *FDIC* v. *Meyer* And With Appellate Decisions Holding That 39 U.S.C. 401(1) Does Not Create Substantive Liability On The Part Of The Postal Service

a. Respondents' sole basis for contending that the antitrust laws apply to the Postal Service is the sue-and-be-sued clause of 39 U.S.C. 401(1), which Congress passed as part of the Postal Reorganization Act. Respondents thus apparently argue (Br. in Opp. 8-9) that Section 401(1) rendered the Postal Service subject to all substantive laws previously inapplicable to the United States and its agencies and instrumentalities, unless those laws expressly directed otherwise. That reasoning mirrors the court of appeals' decision. Pet. App. 4a, 8a, 10a, 13a.

That analysis flatly contradicts the holding of *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994), because it "conflates" the issue of whether Congress has waived a federal entity's sovereign immunity with the "analytically distinct" (quoting *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983)) issue of whether Congress intended to impose liability on the United States and its agencies and instrumentalities. Pet. 12-14. Under *FDIC* v. *Meyer*, a waiver of sovereign immunity does not create a cause of action against federal entities, and courts accordingly must look elsewhere for an independent

source of substantive law that gives the claimant an avenue for relief. Pet. 12-14.

The sue-and-be-sued clause in 39 U.S.C. 401(1) removes the defense of sovereign immunity with respect to statutes that *otherwise* would impose substantive liability on federal agencies and instrumentalities; the clause, however, does not "strip[] the Postal Service of its sovereign status." Pet. App. 13a. In light of the l ng-standing tradition that postal services are an essential "sovereign function," *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 121, as well as the current statutory provisions of Title 39 that demonstrate the Postal Service's federal sovereign character, the sue-and-be-sued clause in Section 401(1) plainly cannot be construed to create new substantive liability under the antitrust laws.

Respondents err in relying (Br. in Opp. 6-10) on the observation in *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 519-520 (1984), and other lower court decisions, that Congress in 1970 launched the Postal Service into the commercial world and rendered it more like other businesses. That observation says nothing about whether another federal statute, such as the Sherman Act, independently imposes substantive liability on an agency or instrumentality of the United States. This Court's subsequent decision in *Meyer*, 510 U.S. at 484, specifically requires such an independent source of liability, and makes clear that substantive liability cannot be inferred solely from Congress's waiver of sovereign immunity in a ue-and-be-sued clause.

Moreover, as explained in the petition (at 15-16), the Court's earlier decisions in *Franchise Tax Board* and in *Loeffler* v. *Frank*, 486 U.S. 549 (1988), concerned only the scope of the waiver of sovereign immunity in 39 U.S.C. 401(1). Neither decision suggested that the sue-and-be-sued clause was itself a source of liability against the Postal Service. To the contrary, in *Loeffler*, the Court recognized that the liability of the Postal Service under Title VII derives not

from the sue-and-be-sued clause but from an express provision in Title VII making that statute applicable to federal agencies. 486 U.S. at 563. And in *Franchise Tax Board*, the Postal Service was merely a stakeholder of the employees' wages that were subject to garnishment, so that no new substantive liability was imposed on the Postal Service. 467 U.S. at 516. The Court simply held that a sue-and-be-sued clause, which under *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), subjects the federal agency concerned to garnishment orders issued by a state court, likewise subjects the federal agency to garnishment orders issued by a state administrative agency. See 467 U.S. at 517-519, 521-525.

Respondents also rely (Br. in Opp. 7-10) on lower court holdings that the Postal Service was a "person" amenable to suit under the Lanham Act at a time when that term extended to an "organization capable of suing and being sued." 15 U.S.C. 1127 (1994). *Federal Express Corp.* v. *United States Postal Service*, 151 F.3d 536 (6th Cir. 1998); *Global Mail Ltd.* v. *United States Postal Service*, 142 F.3d 208, 216-217 (4th Cir. 1998); *United States* v. *Q Int'l Courier, Inc.*, 131 F.3d 770, 775 (8th Cir. 1997). Those decisions are inapposite, because the language of the Lanham Act at the time imposed liability on an organization that had the capacity to sue and be sued. By contrast, as recognized by *Cooper* and *Sea-Land*, the Sherman Act categorically excludes the United States and its agencies and instrumentalities from the coverage of the antitrust laws, whether or not they have the capacity to sue or be sued. Pp. 2-5, *supra*.

b. Respondents do not dispute that the Ninth Circuit's holding conflicts with decisions of other courts of appeals that have held that the "sue-and-be-sued" clause does not provide an independent source of liability against the Postal Service. Pet. 15-17. The Sixth Circuit in *Robinson* v. *Runyon*, 149 F.3d 507, 516-517 (1998), and the Seventh Circuit in *Baker* v. *Runyon*, 114 F.3d 668, 670-671 (1997), cert.

denied, 525 U.S. 929 (1998), have held that the waiver of sovereign immunity in 39 U.S.C. 401(1) does not render the Postal Service liable for punitive damages under Title VII because such awards are not applicable to any "government [or] government agency" under 42 U.S.C. 1981a(b)(1). Similarly, the Second Circuit in *In re Young*, 869 F.2d 158, 159 (1989) (per curiam), held that the Postal Service's sue-and-be-sued clause does not render it amenable to trial by jury, because 28 U.S.C. 2402 prohibits trial by jury against "the United States," because "the waiver does not change the fact that the party being sued is still the federal government."

Those decisions hold that the Postal Service's amenability to suit under 39 U.S.C. 401(1) does not deprive the Postal Service of its governmental character and does not independently create a substantive right against the Postal Service. Those decisions cannot be reconciled with the Ninth Circuit's holding in this case that the Postal Service is subject to substantive liability under the antitrust laws solely by virtue of 39 U.S.C. 401(1).

3. The Impact Of The Ninth Circuit's Decision On The Postal Service's Operations Warrants This Court's Review

The Postal Service is a massive federal entity that conducts a wide variety of operations, employs 770,000 federal employees, receives annual revenues of $66 billion, and delivers 200 billion pieces of mail each year. The Ninth Circuit's unprecedented holding that the Postal Service is a "person" that may be liable for treble damages and attorneys' fees under the antitrust laws immediately threatens to impose substantial burdens and costs on the ongoing operations of the Postal Service that Congress never intended. See Pet. 17-19.

Respondents argue (Br. in Opp. 11) that the detrimental impact from the Ninth Circuit's decision would be lessened by the court of appeals' recognition of a "conduct-based immunity," under which the Postal Service "cannot be sued for carrying out its legislative mandate" but can be sued for "acts contrary to legislative will that are anti-competitive." But Congress never intended federal agencies and instrumentalities such as the Postal Service to be liable to suit under the antitrust laws *at all*. Moreover, all acts of the Postal Service presumptively "carry[] out its legislative mandate" (Br. in Opp. 11), because Congress broadly authorized the Postal Service to take all actions "incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers." 39 U.S.C. 401(10); see Pet. 19-20. Any configuration of the Ninth Circuit's newly minted "conduct-based immunity" thus would create an entirely unnecessary and costly regime that would force the Postal Service to undergo future litigation to determine the contours of such immunity and to show in a particular case that the conduct being challenged was "taken at the command of Congress." Pet. App. 13a.

Respondents also argue (Br. in Opp. 11) that subjecting the Postal Service to liability under the antitrust laws would serve the congressional purpose in the Postal Reorganization Act to make the Postal Service more competitive. In passing *the antitrust laws*, however, Congress made the fundamental policy decision categorically to exclude the United States and its agencies and instrumentalities from suit under the antitrust laws. See *Sea-Land Service*, 659 F.2d at 247 (concluding that Sherman Act did not apply to Alaska Railroad and supervising United States agencies even though such entities "operate[] alongside private companies"). In addition, respondents' position would permit courts, rather than Congress, to determine when and whether the Postal Service's operations are anti-competitive, and if so, whether its operations were not sufficiently authorized by Congress such that the Postal Service should be liable for the severe sanctions imposed by the antitrust laws. It is hard to imagine a scheme more at odds with congressional intent to

establish the Postal Service to perform a governmental function as a part of the Executive Branch of the United States Government.

At bottom, the Ninth Circuit's "conduct-based immunity" defense, whatever its contours, provides little comfort to the Postal Service, as this case demonstrates. Under the Ninth Circuit's decision, the Postal Service will have to undergo potentially expensive and time-consuming litigation to determine whether the antitrust laws apply to respondents' allegation that the Postal Service "conspire[d] to prevent competition in production of mail sacks" (Br. in Opp. 11) when the Postal Service conducted the routine government procurement at issue in this case.

For similar reasons, the need for this Court to review the Ninth Circuit's decision is not diminished by the fact that the Postal Service "may well prevail at trial" or may petition this Court after any imposition of injunctive relief or a treble damages award. Br. in Opp. 11-12. The court of appeals' holding that the Postal Service is amenable to suit under the antitrust laws imposes immediate and direct costs and burdens associated with defending suits challenging the Postal Service's operations as anti-competitive and with conducting its extensive operations under the threat of treble-damages liability. Particularly given the breadth and magnitude of the Postal Service's operations, and the conflict the Ninth Circuit's decision creates with decisions of this Court and other courts of appeals, the Ninth Circuit's holding warrants this Court's review.

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

THEODORE B. OLSON
Solicitor General

MAY 2003

JUL 14 2003

No. 02-1290

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The federal antitrust laws apply to a "person," which is defined to include "corporations and associations existing under or authorized by the laws of * * * the United States." 15 U.S.C. 7 (Sherman Act), 12(a) (Clayton Act). The question presented is whether the United States Postal Service is a "person" amenable to suit under the antitrust laws.

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In the Supreme Court of the United States

No. 02-1290

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 302 F.3d 985. The opinion of the district court (Pet. App. 23a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2002. A petition for rehearing was denied on November 4, 2002 (Pet. App. 28a-29a). On January 23, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 4, 2003, and the petition was filed on that date. The petition was granted on May 27, 2003.

The jurisdiction of this Court rests under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at Pet. App. 30a-34a.

STATEMENT

1. Respondent Flamingo Industries (USA) Ltd., a manufacturer of plastic mail sacks, and its owner, respondent Arthur Wah, brought suit in the Northern District of California against the Postal Service based on its procurement decisions regarding certain mail sacks. In addition to claims under federal procurement law and California state law, the complaint asserted five federal antitrust claims alleging that the Postal Service had revised and disparately enforced its mail sack policies in order to suppress competition and create a monopoly in the production of mail sacks, which resulted in the Postal Service's buying cheaper mail sacks that were manufactured in Mexico.

The district court dismissed respondents' complaint in its entirety. Pet. App. 23a-27a. With respect to the antitrust claims, the district court held that Congress did not intend to impose antitrust liability on the Postal Service. *Id.* at 23a-24a. The district court observed that "[f]ederal instrumentalities are not liable under the antitrust laws." *Id.* at 23a. With respect to the Postal Service in particular, the district court explained that, although Congress in 39 U.S.C. 401(1) had enacted "a general waiver of sovereign immunity" by permitting the Postal Service to "sue and be sued" in its own name, "such language cannot * * * subject [the Postal Service] to liability under the antitrust laws as there was no attempt on the part of Congress to impose

liability in the first place." Pet. App. 23a-24a (internal quotation marks omitted).

2. The United States Court of Appeals for the Ninth Circuit reversed in relevant part, holding that the Postal Service is a "person" subject to liability and suit under the federal antitrust laws. Pet. App. 1a-22a. The court of appeals acknowledged (*id.* at 4a) that a federal agency's amenability to suit is determined by the two-step inquiry set forth in *FDIC* v. *Meyer*, 510 U.S. 471 (1994). Under that approach, courts must determine, first, whether Congress has waived the agency's sovereign immunity and, second, whether "the source of substantive law upon which the claimant relies provides an avenue for relief" against the federal government. *Id.* at 484.

Applying Meyer's first step, the court of appeals held that Congress waived the Postal Service's sovereign immunity by providing in 39 U.S.C. 401(1) that "[t]he Postal Service shall have the . . . power[] to sue and be sued in its official name." Pet. App. 4a (brackets in original). In considering the second question, whether the antitrust statutes provide a substantive cause of action against the Postal Service, the court of appeals rejected the Postal Service's reliance on precedent (*e.g.*, *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), and *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982)) holding that the United States and its instrumentalities are not "persons" subject to suit under the antitrust laws. The court of appeals reasoned that, "[a]lthough a federal sovereign is not a 'person,' the Postal Service is not a sovereign" because the Postal Service does not enjoy sovereign immunity. Pet. App. 8a. The court accordingly concluded that "[t]he Postal Service's sue-and-be-sued waiver of immunity has created a presumption

that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." *Id.* at 10a. The court concluded, however, that the Postal Service may assert "conduct-based" immunity as a defense to antitrust liability "if the action of the Postal Service being challenged was taken at the command of Congress." *Id.* at 13a.

With respect to respondents' non-antitrust claims, the court of appeals reinstated respondents' claim under 28 U.S.C. 1491(b)(1) that the Postal Service violated its own procurement manual provisions, but the court affirmed the dismissal of respondents' state law claims. Pet. App. 13a-22a. On the procurement claim, the court of appeals followed *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071, 1080-1081 (Fed. Cir. 2001), in holding that the Postal Service is a "Federal agency" for purposes of 28 U.S.C. 1491(b)(1), which provides jurisdiction in the Court of Federal Claims (and in the district court in this case) over suits challenging contract actions by federal agencies that violate federal procurement laws or regulations. Pet. App. 15a; see also pp. 20-21, 32, *infra*. The court held that respondents' claims under state law barring fraudulent business practices were preempted by federal law. Pet. App. 19a-20a. The court explained that allowing state law to control the Postal Service's procurement decisions "would impinge" upon the right Congress conferred on the Postal Service under 39 U.S.C. 401(3) "to determine the character and necessity of its expenditures," and "would negate the deferential standard Congress has created for federal court review of [procurement] decisions" under 28 U.S.C. 1491(b)(1). Pet. App. 20a.

SUMMARY OF ARGUMENT

This Court held in *United States* v. *Cooper Corp.*, 312 U.S. 600, 604, 606 (1941), that the United States is excluded from the term "person" amenable to suit under the antitrust laws. That holding likewise applies to federal agencies and instrumentalities through which the United States acts. *E.g.*, *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982).

The Postal Service is such an entity. Postal operations historically have been carried out by the Executive Branch as a "sovereign function" and a "sovereign necessity," *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981), and that tradition was carried forward in creating the Postal Service "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Under the Court's decision in *Cooper*, the Postal Service's character as an agency or instrumentality of the United States renders it not a person amenable to suit under the antitrust laws.

The Ninth Circuit erred in relying on the fact that Congress has authorized the Postal Service to "sue and be sued" in 39 U.S.C. 401(1). This Court concluded in *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (quoting *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983)), that such "reasoning conflates two 'analytically distinct' inquiries," first, whether Congress waived sovereign immunity and, second, whether Congress intended to create a cause of action against federal agencies in the first place. The waiver of sovereign immunity in 39 U.S.C. 401(1) does not by its own force create an antitrust action against the United States, since Congress did not intend that such an action may be

maintained against the United States. Nor does a waiver of sovereign immunity change the fact that the Postal Service remains part of the Executive Branch of the United States Government.

ARGUMENT

THE UNITED STATES POSTAL SERVICE, AS AN AGENCY OR INSTRUMENTALITY OF THE UNITED STATES, IS NOT A "PERSON" UNDER THE FEDERAL ANTITRUST LAWS

A. Agencies And Instrumentalities Of The United States Are Not "Persons" Under The Antitrust Laws

1. This Court held in *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-606 (1941), that Congress did not intend the statutory term "person" as used in the antitrust laws to include the United States. The Court therefore rejected the federal government's contention that the United States is a "person" authorized to sue for treble damages under Section 7 of the Sherman Act, Act of July 2, 1890, ch. 647, 26 Stat. 210.[1] The Court found that, "[w]ithout going beyond the words of the section," "the phrase 'any person' is insufficient" to encompass the United States. *Cooper*, 312 U.S. at 606. The Court explained that, if the United States were a "person" entitled to sue, the United States would likewise be a "person" that "would be liable to suit for treble damages" under Section 7 of the Act, since "[i]t is hardly credible that Congress used the term 'person' in different senses in the same sentence." *Ibid.* "The

[1] Congress repealed Section 7 of the Sherman Act in 1955 because it was redundant in light of the treble damages provision of Section 4 of the Clayton Act, 15 U.S.C. 15(a), which Congress passed in 1914. See *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 644 n.16 (1981).

more natural inference," the Court concluded, "is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations." *Ibid.*

The Court also looked to the surrounding provisions of the Sherman Act and observed that "[i]n §§ 1, 2, and 3 the phrase designating those liable criminally is 'every person who shall' etc." *Cooper*, 312 U.S. at 607. The Court found that "[i]n each instance it is obvious that while the term 'person' may well include a corporation it cannot embrace the United States." *Ibid.*; see also *id.* at 609 (noting with respect to criminal penalties and treble damages provisions of the Revenue Act of 1916 that "[i]t must be obvious that the United States cannot be embraced by the phrase 'any person'"). Additionally, the Court found that, although Section 8 of the Sherman Act specified that the term "person" included a corporation, "the argument that the United States may be treated as a corporation organized under its own laws * * * seems so strained as not to merit serious consideration." *Id.* at 607.[2]

In 1955, in response to the Court's decision in *Cooper*, Congress amended the Clayton Act by adding Section 4A, 15 U.S.C. 15A, to authorize the United States to bring a civil action for actual, but not treble damages. Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282. "Although

[2] Subsequent decisions have recognized that the term "person" as used in the antitrust laws includes certain governmental bodies *other than the United States*, such as foreign countries (*Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978)), States (*Georgia* v. *Evans*, 316 U.S. 159 (1942)), and municipalities (*Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906)). *Pfizer* and *Evans* also reaffirm *Cooper*'s holding that the United States is not a "person" under the antitrust laws. 434 U.S. at 316-317; 316 U.S. at 161-162.

Congress was well aware of the view the Court indicated in *Cooper Corp.*, that Congress had not described the United States as a 'person' for Sherman Act purposes, Congress addressed only the direct holding in that case—the ruling that the United States was not authorized to proceed as a Sherman Act treble damage action plaintiff." *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir. 1981) (R.B. Ginsburg, J.) (footnote omitted), cert. denied, 455 U.S. 919 (1982). "Given the discrete consideration Congress gave to the situation of the United States, after the decision in *Cooper Corp.*, as a Sherman Act damage action plaintiff, and the legislature's total silence on the situation of the United States as a Sherman Act defendant," the Court should not "engraft on the statute additions . . . the legislature might or should have made." *Id.* at 246 (quoting *Cooper Corp.*, 312 U.S. at 605).[3]

2. Just as Congress did not intend the United States to be a "person" under the antitrust laws, Congress did not intend agencies or instrumentalities of the United States to be "persons" under those laws. This Court has repeatedly held that when Congress excludes a sovereign from the statutory term "person," it equally excludes agencies and instrumentalities of the sovereign. The Court has thus concluded that state agencies are not persons liable under the False Claims Act, 31 U.S.C. 3729 (*Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 778-788 (2000)); that federal agencies are not persons under the

[3] In 1990, Congress amended Section 4A of the Clayton Act to authorize the United States to seek treble damages, but again did so without altering the statutory definition of the term "person" or the situation of the United States as a defendant. Pub. L. No. 101-588, § 5, 104 Stat. 2880.

removal provisions of 28 U.S.C. 1442(a)(1) (1988) (*International Primate Prot. League* v. *Tulane Educ. Fund*, 500 U.S. 72, 82-83 (1991)); that state agencies are not persons liable under 42 U.S.C. 1983 (*Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989)); and that federal instrumentalities are not persons under the Clean Water Act, 33 U.S.C. 1362(5) (*EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 222 n.37 (1976)). Where Congress intends a contrary conclusion, it has expressly so provided. See, *e.g.*, 15 U.S.C. 1127 (defining "person" amenable to suit under the Lanham Act to include "the United States [or] any agency or instrumentality thereof").[4]

The principle that the United States and its agencies and instrumentalities should be treated equally with respect to the general statutory term "person" reflects the practical reality that the federal government performs its public functions through many formally separate governmental bodies. Not surprisingly, with the exception of the decision below, the lower courts to have considered the issue have uniformly held that the exclusion of the United States from the term "person" applies with equal force to agencies and instrumentalities of the United States. *Sea-Land Serv., Inc.*, 659 F.2d at 247 (antitrust laws do not apply to actions by Alaska Railroad and related federal agencies); accord

[4] Similarly, governmental agencies and instrumentalities share equally in the immunity of the sovereign from suit. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); see also *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 (1997) ("It has long been settled that the reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.").

Name.Space, Inc. v. *Network Solutions, Inc.*, 202 F.3d 573, 580-581 (2d Cir. 2000) (National Science Foundation is not subject to the antitrust laws); *Rex Sys., Inc.* v. *Holiday*, 814 F.2d 994, 995-997 (4th Cir. 1987) (Department of the Navy is not a person under the Sherman Act); *Greenwood Utils. Comm'n* v. *Mississippi Power Co.*, 751 F.2d 1484, 1504 (5th Cir. 1985) (Southeastern Power Administration is, "of course, not subject to the antitrust laws"); *Jet Courier Servs., Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221, 1228 (6th Cir. 1983) ("As an agency of the federal government the Federal Reserve System may not be sued under the Sherman Act."); *Champaign-Urbana News Agency, Inc.* v. *J.L. Cummins News Co.*, 632 F.2d 680, 689, 692 (7th Cir. 1980) (Army and Air Force Exchange Service, "a governmental instrumentality," is not subject to suit under the Clayton Act). Indeed, the Ninth Circuit itself had previously stated that the assertion of antitrust liability against a federal agency was "frivolous." *Department of Water & Power* v. *Bonneville Power Admin.*, 759 F.2d 684, 693 n.12 (1985); see also *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1289 (1985) (Guam, "an instrumentality of the federal government over which the federal government exercises plenary control," is not subject to antitrust liability), cert. denied, 475 U.S. 1081 (1986).

B. The United States Postal Service Is A Federal Agency Or Instrumentality

1. The exclusion of federal agencies and instrumentalities from the term "person" in the antitrust statutes requires reversal of the Ninth Circuit's holding that the Postal Service is subject to antitrust liability. The Postal Service is a quintessential agency or instrumentality of the United States. This country, like most

other nations, has from its beginning treated the furnishing of postal services as a "sovereign function" and a "sovereign necessity." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981). In fact, our postal system is "the nation's oldest and largest public enterprise." John T. Tierney, *The United States Postal Service: Status and Prospects of a Public Enterprise* at vii (1988) (Tierney).

The Continental Congress in 1775 appointed Benjamin Franklin as the first Postmaster General, with responsibility for postal operations. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 121. The Articles of Confederation continued federal mail delivery. Act of Oct. 18, 1782, 23 J. Cont'l Cong. 672-673 (G. Hunt ed. 1914). In 1789, the First Congress exercised its authority "[t]o establish Post Offices and post Roads," U.S. Const. Art. I, § 8, Cl. 7, by creating the Office of the Postmaster General to oversee federal postal services. Act of Sept. 22, 1789, ch. 16, 1 Stat. 70.

Congress thereafter established the Post Office and passed restrictions on private mail carriers. Act of Feb. 20, 1792, ch. 7, §§ 3, 14, 1 Stat. 234, 236. The Postal Act of 1845 granted the Post Office exclusive rights to transmit letters and "other mailable matter." Act of Mar. 3, 1845, ch. 43, § 10, 5 Stat. 736. Those statutes created the postal "monopoly" privileges (subject to specified exceptions) that persist in similar form today over the carriage of letters in and from the United States. Those restrictions serve to protect the revenues of the Postal Service to fulfill its mission of serving all customers. *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 519 (1991) (citing 39 U.S.C. 601-606 and 18 U.S.C. 1693-1699); *Regents of the Univ. of Cal.* v. *Public Employment Relations Bd.*, 485 U.S. 589, 593-594, 598 (1988); Joseph F. Johnston,

Jr., *The United States Postal Monopoly*, 23 Bus. Law. 379, 386 (1968). Congress later formally established the Post Office Department as part of the Executive Branch. Act of June 8, 1872, ch. 335, 17 Stat. 283. Accordingly, the sovereign status of postal operations was firmly established when Congress passed the Sherman Act in 1890 and the Clayton Act in 1914 in order to prevent monopolization and other anti-competitive behavior by non-federal enterprises.

At the same time, the Post Office Department underwent several notable changes. In addition to geographically expanding into new territories such as Alaska and Hawaii near the turn of the century, the Post Office initiated free delivery service for America's rural population, and in 1913 began parcel post service despite significant opposition from private "express companies." Carl H. Scheele, *A Short History of the Mail Service* 106-110, 114-118, 143-146 (1970). Those expanded postal services, along with population growth and industrialization, increased the amount of mail handled by the Post Office from approximately 5 billion pieces in 1895 to over 18 billion in 1913, which in turn spurred the Post Office to purchase high-volume machinery and equipment to meet its public responsibilities. *Id.* at 120-121, 139.

Despite its increased commercial activities as a purchaser of goods and services, and as a competitor in parcel post services, the Post Office retained its character as an arm of the United States. Postal operations were managed directly by a cabinet-level officer, the Postmaster General, subject to Acts of Congress that dictated the Post Office Department's wages, capital spending, office locations, and postal rates. Tierney 10 (noting that congressional control over the Post Office

extended "[t]o a degree unmatched in any other executive agency or department").

2. Postal reform later became necessary because the Post Office Department lacked authority to make critical management decisions regarding postal operations and because Congress could no longer manage such administrative details itself. Tierney 9-29. After extensive hearings and debate, Congress in 1970 responded by enacting the Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719, which transferred the responsibilities of the Post Office Department to today's Postal Service. Congress did not, however, establish the Postal Service as a corporation with a corporate charter or equity ownership interests. Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 386-391 (1995) (detailing history of government corporations). Thus, contrary to the court of appeals' belief (Pet. App. 11a), Congress made no change in 1970 that would bring the Postal Service within the portion of the definition of "person" in 15 U.S.C. 7 that includes "corporations" organized under the laws of the United States or a State or territory. Rather, Congress created the Postal Service "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Indeed, Congress expressly stated that the Postal Service shall be operated as "a basic and fundamental service" that is "provided to the people *by the Government of the United States* * * * to bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. 101(a) (emphasis added).

Numerous other provisions of the PRA confirm the Postal Service's fundamentally governmental character. First, the PRA mandates universal public service by providing that "costs of establishing and maintaining

the Postal Service shall not be apportioned to impair the overall value of such service to the people." 39 U.S.C. 101(a). Regardless of profits, the Postal Service must "provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining." 39 U.S.C. 101(b), 403(a). Thus, "[n]o small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities." 39 U.S.C. 101(b). See also H.R. Rep. No. 1104, 91st Cong., 2d Sess. 9 (1970) ("The Postal Service is required to * * * serve as nearly as practicable the entire population of the United States. In [that] respect, the existing concept of universality of postal service is explicitly carried forward.").

Second, the Postal Service is managed by a Board of Governors whose eleven members are "officer[s] of the Government." 39 U.S.C. 202, 205(d). The President appoints nine of the eleven members, subject to Senate confirmation. 39 U.S.C. 202(a). The Governors "shall be chosen to represent the public interest generally, and shall not be representative of specific interests using the Postal Service." *Ibid.* The Presidentially-appointed nine Governors select the Postmaster General, and those members together select the Deputy Postmaster General. 39 U.S.C. 202(c) and (d); see S. Rep. No. 912, 91st Cong., 2d Sess. 3 (1970) (describing the Act's aim to establish "a postal structure and a method of operating that will entrust the management of the U.S. postal service * * * to responsible public officials whose authority derives from the President"). Similarly, Postal Service employees are federal employees within the federal civil service, who take an oath of office and are subject to limitations on political

activity, prohibitions against strikes, and regulations promulgated by the President for Executive Branch employees. 39 U.S.C. 410(b)(1)-(2), 1001, 1011; see H.R. Rep. No. 1104, *supra*, at 14 ("[T]he Postal Service is too important to the people and the economy of this Nation for us to tolerate postal strikes. * * * In the public sector * * * [a] strike would not merely threaten the income of a public enterprise * * * , it would also directly imperil the public welfare.").

Third, the Postal Service has uniquely federal sovereign powers, including the authority to exercise, "in the name of the United States, the right of eminent domain * * * and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates" (39 U.S.C. 401(9)); to negotiate international postal treaties and conventions (39 U.S.C. 407); to share property and services with other executive agencies of the federal government (39 U.S.C. 411); to borrow on the United States' "full faith and credit" (39 U.S.C. 2006(c)); "to investigate postal offenses and civil matters relating to the Postal Service" (39 U.S.C. 404(a)(7)); and to promulgate federal rules and regulations "as it deems necessary to accomplish the objectives of this title" (39 U.S.C. 401(2)). Likewise, all liabilities incurred by the Postal Service, such as litigation judgments and settlements, are ultimately financed by the public fisc, and Postal Service revenues are formally appropriated by Congress and are held by the United States Treasury in a "Postal Service Fund." 39 U.S.C. 2001, 2003, 2008(c), 2401(a).

Finally, the prices and rates for postal services and goods provided by the Postal Service are set by public officials in furtherance of the public interest. When the Postal Service determines that "changes in a rate or

rates of postage or in a fee or fees for postal services * * * would be in the public interest," 39 U.S.C. 3622(a), the Postal Service submits a recommendation or request to the Postal Rate Commission, which Congress similarly created as an "independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 3601(a). After conducting a public hearing, 39 U.S.C. 3624, the Commission makes a recommended decision to the Governors of the Postal Service, who may "approve, allow under protest, reject, or modify that decision," 39 U.S.C. 3625(a), subject to judicial review, 39 U.S.C. 3628.

Thus, provisions confirming the sovereign status of the Postal Service as an establishment in the Executive Branch pervade the laws governing the Postal Service. In *Lebron*, the Court held that Amtrak, a government corporation that Congress chartered "not [to] be an agency, instrumentality, authority, or entity, or establishment of the United States," 45 U.S.C. 541 (1988), was nonetheless "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. at 391, 394. The Court made clear, however, that Congress's "disclaimer of agency status * * * is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control." *Id.* at 392. Conversely here, Congress's express *preservation* of the Postal Service's status as an "establishment of the executive branch of the Government of the United States," 39 U.S.C. 201, vested with numerous sovereign powers, compels the conclusion that Congress intended to exclude the Postal Service, like other federal entities, from the category of "persons" subject to suit under the antitrust laws.

C. The Postal Service's Sue-And-Be-Sued Clause Does Not Render The Postal Service A "Person" Under The Antitrust Laws

In holding that a cause of action under the antitrust laws may be maintained against the Postal Service, the Ninth Circuit relied solely on the fact that Congress has waived the Postal Service's sovereign immunity by permitting it "to sue and be sued" under 39 U.S.C. 401(1). The court of appeals concluded that such a waiver of sovereign immunity deprives the Postal Service of its sovereign status as a federal governmental entity.[5] Respondents embrace similar reasoning. They argue that the term "person" includes any federal agency or instrumentality that Congress has authorized to sue and be sued, because such an entity "can 'sue and be sued' just *like* any 'corporation[] and association[]'" that is expressly covered by the term "person" in the antitrust laws. Br. in Opp. 3-4 (quoting 15 U.S.C. 7) (emphasis added). That analysis is fundamentally flawed.

1. This Court in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), has already rejected the contention that a sue-and-be-sued clause is sufficient, in and of itself, to create

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[5] Pet. App. 4a ("[T]he Postal Service lost its sovereign status pursuant to the Postal Reorganization Act of 1970 * * * which provides in relevant part that 'The Postal Service shall have the . . . power[] to sue and be sued in its official name.'") (quoting 39 U.S.C. 401(1)); *id.* at 8a ("Although a federal sovereign is not a 'person,' the Postal Service is not a sovereign."); *id.* at 10a ("Here, the Postal Service does not enjoy federal sovereignty."); *ibid.* ("The Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn."); *id.* at 13a ("Congress has stripped the Postal Service of its sovereign status by launching it into the commercial world as a sue-and-be-sued entity akin to a private corporation.").

substantive liability on the part of an agency or instrumentality of the United States. The plaintiff in *Meyer* sued the Federal Savings and Loan Insurance Corporation (FSLIC) under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), contending that, although *Bivens* liability is normally available only against government officials, a cause of action should be recognized under *Bivens* against FSLIC because the agency's sue-and-be-sued clause, 12 U.S.C. 1725(c)(4) (1988), broadly waived sovereign immunity.

This Court unanimously held that the Ninth Circuit had erred in finding that the plaintiff "had a cause of action for damages against FSLIC *because* there had been a waiver of sovereign immunity." *Meyer*, 510 U.S. at 483-484. The Court explained that such "reasoning conflates two 'analytically distinct' inquiries," first, whether there is a waiver of a sovereign immunity, and second, whether Congress intended to create a substantive cause of action against the federal entity. *Id.* at 484; see also *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (The sovereign immunity waiver in "the Tucker Act does not create any substantive right enforceable against the United States for money damages. A substantive right must be found in some other source of law.") (citations and internal quotation marks omitted); accord *United States* v. *Navajo Nation*, 123 S. Ct. 1079, 1089 (2003). The Court in *Meyer* accordingly held that, notwithstanding a waiver of sovereign immunity, plaintiffs cannot sue a federal entity unless it is independently evident that "the source of substantive law upon which the claimant relies provides an avenue for relief" against the government and its agencies. 510 U.S. at 484. Turning to the latter inquiry, *Meyer* held that plaintiffs have no *Bivens* cause of action against federal agencies. *Id.* at 484-486.

Contrary to *Meyer*, the Ninth Circuit below did not undertake to determine whether there was an independent substantive basis under the *antitrust laws* for imposing liability against the Postal Service; rather, the court relied exclusively on the sue-and-be-sued clause in the *PRA*. As discussed above, however, no cause of action under the antitrust laws exists against a United States agency or instrumentality. See pp. 8-10, *supra*. And under this Court's decision in *Meyer*, the Postal Service's sue-and-be-sued clause does not furnish a basis for recognizing a cause of action that would otherwise be unavailable against an agency or instrumentality of the United States. Cf. *Sea-Land Serv., Inc.*, 659 F.2d at 244 ("Were sovereign immunity our sole concern, * * * we would hold the named United States agencies and officials answerable in this action.").

In *Meyer*, Congress's waiver of immunity in a sue-and-be-sued clause did not alter FSLIC's status as a federal agency, and it therefore could not furnish a basis for imposing otherwise unavailable *Bivens* liability upon that federal agency. Likewise, nothing in Congress's waiver of sovereign immunity in the sue-and-be-sued clause of 39 U.S.C. 401(1) alters the fundamental sovereign character of the Postal Service or imposes unprecedented antitrust liability on the United States. In other words, "the waiver does not change the fact that the party being sued is still the federal government." *In re Young*, 869 F.2d 158, 159 (2d Cir. 1989) (per curiam). To the contrary, Congress's waiver of the Postal Service's *sovereign* immunity presupposes that the Postal Service *is* part of the federal sovereign. *Robinson* v. *Runyon*, 149 F.3d 507, 517 (6th Cir. 1998) ("The mere fact that Congress even had to explicitly waive the sovereign immunity of the Postal Service in the first place indicates that Congress considered the

Postal Service a federal agency, or otherwise such a waiver would be unnecessary.").[6]

That conclusion is supported not only by this Nation's long history of treating postal service as "a sovereign function" and "a sovereign necessity," *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 121, but also by the numerous current provisions in Title 39 discussed above (pp. 13-16, *supra*) that explicitly refer to and treat the Postal Service as an "independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Indeed, relying on that very provision of the PRA, the court of appeals, in another part of its decision that we do not challenge here, held that the Postal Service *is* a "Federal agency" that is subject to suit under 28 U.S.C. 1491(b)(1) based on an alleged violation of a statute or regulation governing its procurement decisions. Pet. App. 15a (citing 39 U.S.C. 201 and adopting the reasoning of *Emery*

[6] There are numerous instrumentalities and agencies of the United States that have sue-and-be-sued clauses. *E.g.*, 7 U.S.C. 942 (Rural Telephone Bank); 7 U.S.C. 1506 (Federal Crop Insurance Corporation); 12 U.S.C. 635(a)(1) (Export-Import Bank of the United States); 12 U.S.C. 1441a(a)(5)(J) (Thrift Depositor Protection Oversight Board); 12 U.S.C. 1789(a)(2) (National Credit Union Administration Board); 12 U.S.C. 1819 (Federal Deposit Insurance Corporation); 12 U.S.C. 2013(4) (Farm Credit Banks); 12 U.S.C. 2073(4) (Production Credit Associations); 12 U.S.C. 2093 (Federal Land Bank Associations); 12 U.S.C. 2278a-3 (Farm Credit System Assistance Board); 12 U.S.C. 2278b-4 (Farm Credit System Financial Assistance Corporation); 12 U.S.C. 2279aa-3 (Federal Agricultural Mortgage Corporation); 12 U.S.C. 2289(1) (Federal Financing Bank); 15 U.S.C. 634(b)(1) (Small Business Administration); 15 U.S.C. 714b (Commodity Credit Corporation); 22 U.S.C. 290f (Inter-American Foundation); 22 U.S.C. 2199(d) (Overseas Private Investment Corporation); 29 U.S.C. 1302(b)(1) (Pension Benefit Guaranty Corporation).

Worldwide Airlines, Inc. v. *United States*, 264 F.3d 1071, 1080-1083 (Fed. Cir. 2001)). If Congress, in enacting the PRA, had intended to subject the Postal Service to statutes that otherwise exclude the United States, such as the antitrust laws, Congress naturally would have been expected at least to provide that the Postal Service is *not* an agency or establishment of the United States, as it repeatedly has done with other congressionally created bodies. See, *e.g.*, *Lebron*, 513 U.S. at 391, 392, 394.[7]

The Ninth Circuit's reliance on a sue-and-be-sued clause is also inconsistent with the reasoning this Court employed in *Cooper* in holding that the United States is not a "person" that *may sue* as an antitrust plaintiff when it acts as a purchaser. As the Court recognized,

[7] See also *e.g.*, 2 U.S.C. 801 (Congressional Award Board); 10 U.S.C. 177(a)(1) (American Registry of Pathology); 10 U.S.C. 178(a) (Henry M. Jackson Foundation for the Advancement of Military Medicine); 12 U.S.C. 1701y(a)(2) (National Homeownership Foundation); 12 U.S.C. 1701j-2(b)(1) (National Institute of Building Sciences); 15 U.S.C. 78ccc(a)(1)(A) (Securities Investor Protection Corporation); 15 U.S.C.A. 7211(b) (Public Company Accounting Oversight Board); 16 U.S.C. 544c(a)(1)(A) (Columbia River Gorge Commission); 16 U.S.C. 3701(a) (National Fish and Wildlife Foundation); 16 U.S.C. 5802(a) (Natural Resources Conservation Foundation); 20 U.S.C. 5509(a)(1)(B) (National Environmental Education and Training Foundation); 22 U.S.C. 4411(a) (National Endowment for Democracy); 22 U.S.C. 5841(h)(1) (Democracy Corps); 25 U.S.C. 458bbb(c) (American Indian Education Foundation); 36 U.S.C. 151301(b) (National Fallen Firefighters Foundation); 36 U.S.C. 151701(b) (National Film Preservation Foundation); 36 U.S.C. 152401(b) (National Recording Preservation Foundation); 36 U.S.C. 40701(b) (Corporation for the Promotion of Rifle Practice and Firearms Safety); 42 U.S.C. 290b(a) (Foundation for the National Institutes of Health); 47 U.S.C. 396(b) (Corporation for Public Broadcasting); 49 U.S.C. 24301(a)(3) (Amtrak).

"[t]he United States is a juristic person in the sense that it has capacity *to sue*." 312 U.S. at 604 (emphasis added). The Court nonetheless held that Congress did not intend the United States to be included as a "person" that is protected by and entitled to sue for damages under the antitrust laws. *Id.* at 606. It follows that the United States (or one of its agencies or instrumentalities) likewise is not a "person" that can be sued for treble damages under those laws even when it has the general capacity *to be sued*.

2. The Ninth Circuit erred in relying (Pet. App. 4a-8a, 10a-11a, 12a-13a) on this Court's decisions in *Loeffler* v. *Frank*, 486 U.S. 549 (1988), and *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512 (1984), as a basis for distinguishing cases such as *Cooper* and *Sea Land Services* and imposing antitrust liability on the Postal Service. In *Franchise Tax Board*, the Court held that agencies with a sue-and-be-sued clause cannot invoke sovereign immunity as a defense against otherwise proper administrative garnishment orders. The Court had previously held in *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), that an agency's sue-and-be-sued clause waives sovereign immunity to a *judicial* garnishment order directed to money owed by the agency to one of its employees. The Court reasoned in *Burr* that "the words 'sue and be sued' in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings," and a garnishment order is "part and parcel of the process * * * for the collection of debts." *Id.* at 245-246. In *Franchise Tax Board*, the Court simply applied the rule of *Burr* to *administrative* garnishment orders, holding that they are "in operation and effect * * * identical to the judgment of a court," such that "it is illogical to conclude that Congress would

have differentiated between process issued by the Board and that of a court." 467 U.S. at 522, 523. Thus, nothing in *Franchise Tax Board* suggests that a sue-and-be-sued clause can be the basis for imposing new substantive liability on a federal agency. To the contrary, the Court noted that the Postal Service was simply a stakeholder of the employee's wages that were the subject of the garnishment order. *Id.* at 520.

In *Loeffler*, the Court similarly held that the Postal Service's sue-and-be-sued clause waives any sovereign immunity defense against an award of prejudgment interest under Title VII of the Civil Rights Act of 1964 because such "awards [are] a normal incident of suits." 486 U.S. at 558. The Court did not suggest that the sue-or-be-sued clause had subjected the Postal Service to suits (or substantive liability) under Title VII to begin with. Rather, in answering the latter question, the Court looked to the provisions of Title VII itself. See p. 24, *infra*.

In concluding that "the Postal Service should be treated as a private corporation," Pet. App. 10a, the Ninth Circuit cited the statement in *Franchise Tax Board* that "[the Court] must presume that the Service's liability is the same as that of any other business," 467 U.S. at 520; accord *Loeffler*, 486 U.S. at 556, as well as the statement in *Loeffler* that, by "including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise,'" *ibid.* (quoting *Library of Congress* v. *Shaw*, 478 U.S. 310, 317 n.5 (1986)). The Court made those statements, however, in the context of determining the Postal Service's status for purposes of construing the scope of the waiver of sovereign immunity in 39 U.S.C. 401(1). Neither *Franchise Tax Board* nor *Loeffler* suggested

that the Postal Service is not an agency or instrumentality of the United States, or that a sue-and-be-sued clause may by itself create substantive liability against the United States. To the contrary, the Court's decision in *Loeffler* explicitly recognized that the Postal Service's substantive liability under Title VII *does not* derive from either the Postal Service's sue-and-be-sued clause or the provisions of Title VII that apply to *private* parties, but rather derives from separate amendments to Title VII that altered Title VII's definition of "employer" to create a cause of action against federal agencies. 486 U.S. at 558-561, 563. In any event, the Court's decision in *Meyer*, 510 U.S. at 484, which was rendered after both *Franchise Tax Board* and *Loeffler*, specifically requires such an independent source of substantive liability, and makes clear that substantive liability cannot be based solely on Congress's waiver of sovereign immunity in a sue-and-be-sued clause.

3. For similar reasons, respondents err in attempting (Br. in Opp. 6-8) to draw support from the proposition that the sue-and-be-sued clause was a part of Congress's general design that the Postal Service "be run more like a business than had its predecessor, the Post Office Department." *Loeffler*, 486 U.S. at 556 (quoting *Franchise Tax Bd.*, 467 U.S. at 520). That observation says nothing about whether another federal statute, such as the Sherman Act, independently imposes liability on an agency or instrumentality of the United States, the inquiry mandated by *Meyer*, 510 U.S. at 484. As explained above, Congress intended to exclude the United States and its agencies and instrumentalities from the term "person" subject to suit under the antitrust laws. Pp. 6-10, *supra*. Moreover, Congress explicitly did not create the Postal Service as a private business or corporation, but rather constituted it "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Thus, although the Postal Service may have a "commercial *like*" operation, "it functions as part of the federal government," exercises "uniquely governmental powers such as the authority to borrow money backed by the full faith and credit of the United States Government, the right of eminent domain, and the right to negotiate international postal treaties and conventions," and is to "be operated as a basic and fundamental service provided to the people *by the Government of the United States*." *Robinson*, 149 F.3d at 516 (citations omitted) (quoting 39 U.S.C. 101(a)). Accordingly, "[t]he Postal Service may be run in a manner *similar* to a private commercial entity, but it is not a private commercial entity." *Baker* v. *Runyon*, 114 F.3d 668, 670-671 (7th Cir. 1997), cert. denied, 525 U.S. 929 (1998).

The legislative history of the PRA confirms Congress's intent to carry forward the federal governmental character of postal operations in creating the Postal Service, even as Congress sought to improve the efficiency of its operations. Congress passed the PRA to provide the Postal Service with greater bureaucratic independence, thereby seeking to free postal operations from the partisan delays that had accompanied direct political supervision. S. Rep. No. 912, 91st Cong., 2d Sess. 2-4 (1970); H.R. Rep. No. 1104, 91st Cong., 2d Sess. 5-6, 11-21 (1970). The House Report explained that "[t]he Postal Service is a public service but there is no reason why it cannot be conducted in a businesslike way." *Id.* at 11. Congress sought to achieve that objective by providing for a tenure system, political independence, and managerial authority over labor relations, postal rates, and financing. *Id.* at 12-19. Those "busi-

nesslike" features, however, in no way detract from Congress's paramount intent that "[t]he Postal Service is—first, last and always—a public service." *Id.* at 19.

Moreover, Congress specifically rejected earlier legislative proposals to establish the Postal Service as a government corporation. Dorothy G. Fowler, *Unmailable, Congress and the Post Office* 187-191 (1977). As the House Report explained, the PRA "does not provide for a Government corporation, but it does provide for matching responsibility with authority to conduct the affairs of the Postal Establishment on a business like basis, while retaining the public service character of the Nation's mail system." H.R. Rep. No. 1104, *supra*, at 6; accord S. Rep. No. 912, *supra*, at 4 ("[T]he Postal Service is in fact and shall be operated as a service to the American people, not as a business enterprise."); H.R. Doc. No. 313, 91st Cong., 2d Sess. 2 (1970) (message from President Nixon) (endorsing postal reform that would "serve the public interest of all Americans" through an entity akin to "such presently existing independent establishments as the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission, and the National Aeronautics and Space Administration"). In short, "[t]he Postal Service is not a business; it is not at liberty to design its services and policies with its eye on the bottom line. It is a governmental organization serving the American public." Tierney 74.

D. Other Features Of The Antitrust Laws And The Postal Reorganization Act Undermine The Court of Appeals' Holding

1. a. As the Court observed in *Cooper*, 312 U.S. at 606-607, the antitrust laws impose treble damages and criminal penalties on a "person" who violates the anti-

trust laws in circumstances specified in those laws. 15 U.S.C. 1, 2, 13a, 15(a). The Court in *Cooper* thought it "obvious" that Congress did not intend to impose such liability on the United States. 312 U.S. at 607, 609. To this day, in fact, in the exceptional case in which Congress has intended to impose special damages on the United States, it has done so expressly. See 12 U.S.C. 3417(a)(3) (authorizing punitive damages against "agencies or departments of United States" for willful or intentional violation of statutory provisions protecting privacy of financial records). The Ninth Circuit, by concluding that the Postal Service is subject to the antitrust laws by virtue of a sue-and-be-sued clause in its organic act, has by inference created an antitrust cause of action for treble damages against an agency of the United States when Congress itself has declined to do so. In light of the consequences for the public fisc, "to recognize a direct action for damages against federal agencies" would be "inappropriate," because it would create, in the absence of express congressional authorization, "a potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486.

That conclusion holds particularly true here, given the breadth, variety, and magnitude of the Postal Service's operations. The Postal Service employs 770,000 federal employees, receives annual revenues of $66 billion, and delivers 200 billion pieces of mail each year by exercising its exclusive rights over the carriage of letters, and by competing with private businesses in the delivery of express-mail, parcel, overseas and other delivery services. United States Postal Service, *2002 Annual Report* 52-53; United States Postal Service, *Transformation Plan* at i (Apr. 2002). In light of economic uncertainties, increased security needs, and advances in communications technology that reduce the

volume of mail, United States Postal Service, *2002 Annual Report* 16; *United States Postal Service*, Transformation *Plan* at i, 1-3, the Postal Service cannot readily afford increased costs that Congress neither intended nor anticipated. Ultimately, the burdens associated with litigation costs, settlements, or judgments under the antitrust laws would be borne by the American public, either through higher service fees or larger budgetary appropriations. 39 U.S.C. 2001, 2003, 2008(c).

There is also no basis for concluding that Congress intended the Postal Service to be governed by the substantive standards of the antitrust laws. Congress has determined that the actions of the Postal Service are presumptively in the Nation's public interest by establishing it as part of the Executive Branch of the United States Government. 39 U.S.C. 201. Congress has therefore entrusted the Postal Service with the responsibility for determining whether its operations are anti-competitive, and, if so, whether other public benefits nonetheless warrant its actions.

b. The Ninth Circuit's decision cannot be justified, nor its harmful consequences minimized, by that court's recognition of an exception from antitrust liability based on "'conduct-based' immunity" if the "action of the Postal Service being challenged was taken at the command of Congress." Pet. App. 13a. Congress never intended federal agencies and instrumentalities such as the Postal Service to be liable to suit under the antitrust laws *at all*. For that reason, any configuration of the Ninth Circuit's "conduct-based immunity" would create a regime and impose costs that Congress never intended by forcing the Postal Service to undergo future litigation to determine the contours of such immunity and to show in a particular case that the

conduct being challenged was "taken at the command of Congress." *Ibid.* "To open the door to [antitrust] claims would only invite endless litigation over both real and imagined claims * * * , imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such * * * claims would itself be substantial." *OPM* v. *Richmond*, 496 U.S. 414, 433 (1990).

Furthermore, the Ninth Circuit's recognition of a "'conduct-based' immunity" (and only such an immunity) is entirely out of place for a federal establishment in the Executive Branch, such as the Postal Service. Congress itself broadly authorized the Postal Service to take all actions "incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers." 39 U.S.C. 401(10). Of particular relevance here, Congress specifically authorized the Postal Service to conduct procurements, such as the purchasing of mail sacks challenged in this case, by giving the Postal Service the power "to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures." 39 U.S.C. 401(3). And as the court of appeals itself pointed out, the Postal Service's procurement decisions under Section 401(3) are subject to the deferential arbitrary-and-capricious standard of judicial review when they are challenged in federal court under 28 U.S.C. 1491(b)(1). Pet. App. 20a.

Indeed, precisely because of the broad authority those provisions confer on the Postal Service, the court of appeals concluded that respondents' cause of action under Section 1700 of the California Business and Professional Code, which applies to "any unlawful, unfair, or fraudulent business act or practice," was preempted. The court reasoned that subjecting the Postal Service

to liability under state law would "impinge upon the Service's right [under 39 U.S.C. 401(3)] to control the character and necessity of its purchases free from state constraint," and "would negate the deferential standard" of review Congress prescribed under 28 U.S.C. 1491(b)(1). Pet. App. 20a. Subjecting the Postal Service to suit and treble damages liability under the antitrust laws would be equally inconsistent with Congress's judgment to vest the Postal Service, as a sovereign entity of the United States, with broad discretion over its operations under federal law.

In terms of Congressional authorization, moreover, there is no basis for distinguishing the government procurement in this case from any number of actions taken by the Postal Service that might disappoint private parties. For instance, in addition to the power to enter into contracts, Congress authorized the Postal Service to set prices for its postal services, negotiate postal treaties, and promulgate regulations with the force and effect of law. Pp. 15-16, *supra*. No conduct taken pursuant to those grants of authority under federal law is subject to antitrust scrutiny because the Postal Service is an arm of the United States and therefore is not a "person" amenable to suit. The Ninth Circuit's decision, by contrast, would require Congress specifically to direct each of the Postal Service's myriad purchasing and other operational decisions in order to exempt them from the application of the antitrust laws, thereby flouting Congress's general intent in creating federal agencies, *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989), and Congress's specific intent in the PRA to eliminate congressional micro-management of postal operations while vesting the Postal Service itself with broad discretion (see pp. 13, 25-26, *supra*). In short, application of the antitrust laws to the Postal

Service would be inconsistent with the regime that Congress itself fashioned for the Postal Service under federal law.[8]

2. Nor is there a valid justification to create antitrust liability against a federal entity like the Postal Service so that private parties such as respondents may seek redress for alleged injuries from the government's procurement decisions. As an initial matter, whether "it is anomalous and unfair for a United States instrumentality to escape the regimen of antitrust laws the Government would compel its rivals in commerce to obey" is "a policy judgment" within the province of Congress, not courts. *Sea-Land Serv., Inc.*, 659 F.2d at 247; accord *Meyer*, 510 U.S. at 486 ("We leave it to Congress to weigh the implications of such a significant expansion of Government liability.").

In any event, Congress has provided avenues for challenging the contracting decisions of federal governmental entities such as the Postal Service. The Postal Service is subject to the Contract Disputes Act

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[8] The submission in the text—that the antitrust laws do not apply to the Postal Service as a *federal* agency, and that an attempt to reconcile their application through invocation of a conduct-based immunity is entirely out of place under the congressional design for the Postal Service—does not implicate the so-called state action doctrine under the antitrust laws. That doctrine does not address the question whether the defendant is a 'person' within the meaning of the antitrust laws, but rather the analytically distinct question whether conduct by a private party or an entity created by state law is immune from antitrust liability because it manifests a clearly articulated and affirmatively expressed state policy and (when the actor is a private person) whether it is performed under active state supervision. See, *e.g.*, *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48 (1985).

of 1978, 41 U.S.C. 601(2), which sets forth comprehensive procedures for submitting, processing, and adjudicating claims by a contractor against the government. 41 U.S.C. 605-613; see also 39 C.F.R. 955 (establishing Postal Board of Contract Appeals). Respondent Flamingo Industries twice availed itself of the Contract Disputes Act after the Postal Service terminated its contract for default. *Appeal of Flamingo Industries (USA), LTD*, No. 4121 (Postal Board of Contract Appeals filed Oct. 31, 1997); *Flamingo Industries (USA) LTD* v. *United States*, No. 98-722C (Court of Federal Claims filed Sept. 14, 1998).[9]

Nor were respondents without a remedy to challenge what they perceived to be unfair procurement practices by the Postal Service in contracting with respondents' competitors, Mexican suppliers of mail sacks. The Postal Service's regulations provide administrative procedures for bringing challenges relating to the solicitation or award of a contract. 39 C.F.R. 211.2(a)(2). Moreover, as pointed out above, the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, 110 Stat. 3870, gives the Court of Federal Claims jurisdiction over any claim by an "interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. 1491(b)(1). That Act also permits the award of injunctive, declaratory, and limited monetary relief. 28 U.S.C. 1491(b)(2). The Ninth and Federal Circuits have held that the Postal Service is a "Federal agency" subject to the ADRA, and the Ninth Circuit has reinstated

[9] Those cases settled in January 1999.

respondents' ADRA claims against the Postal Service in this case. See p. 4, *supra*. Respondents therefore have specific statutory means to seek relief for their alleged injuries, and there is no justification for taking the extraordinary step of holding that an agency or instrumentality of the United States is subject to suit under the antitrust laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
and ARTHUR WAH,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Postal Service, an independent establishment of the executive branch that Congress has authorized to engage in commercial pursuits and to sue and be sued in its own name, is amenable to suit as a "person" under the federal antitrust laws.

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Respondent, Flamingo Industries (U.S.A.) Ltd., was set forth at page II of the Brief in Opposition, and there are no amendments to that statement.

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In the Supreme Court of the United States

No. 02-1290
UNITED STATES POSTAL SERVICE , PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH, RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals is reported at 302 F.3d 985 (Pet. App. 1a-22a). The opinion of the district court is unreported (Pet. App. 23a-27a).

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2002. A petition for rehearing with suggestion for rehearing *en banc* was denied on November 4, 2002 (Pet. App. 28a-29a). The United States Postal Service filed a petition for a writ of certiorari on March 4, 2003, and the petition was granted on May 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8 of the Sherman Act, 15 U.S.C. § 7, provides in relevant part:

> The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Section 1 of the Clayton Act, 15 U.S.C. § 12, provides in relevant part:

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Other relevant statutory provisions are reproduced in the statutory appendix, infra App. 1a- 7a.

STATEMENT

Respondents Flamingo Industries and its owner, Arthur Wah, filed suit in the United States District Court for the Northern District of California against petitioner, the United States Postal Service (USPS), for antitrust and other injuries stemming from petitioner's termination of a contract with Flamingo to produce U.S. mail sacks. Respondents alleged under the Sherman and Clayton Acts that petitioner attempted to suppress competition and create a monopoly in mail sack production. Respondents further contended that petitioner manipulated requirements for the sacks in an effort to award a contract to a favored vendor, even though the mail sacks of the other vendors were of inferior quality and posed an environmental risk to postal service

employees. Respondents also alleged injuries arising out of petitioner's violation of its own procurement regulations; argued that the USPS's conduct violated the implied covenant of good faith and fair dealing; and asserted violations under California Business and Professions Code § 17200.

The district court granted petitioner's motion to dismiss on all claims, reasoning in relevant part that Congress did not intend to impose antitrust liability on petitioner. Pet. App. 23a-24a. The court dismissed respondents' non-antitrust claims for lack of venue. *Id.* at 26a.

The United States Court of Appeals for the Ninth Circuit reversed in part, holding that petitioner, as a "person," is subject to the federal antitrust laws. To reach that result, the court followed the framework set out in *FDIC v. Meyer*, 510 U.S. 471 (1994). First, the court "consider[ed] whether 39 U.S.C. § 401(1)" – the provision establishing that petitioner can sue and be sued – "operates as a waiver of the Postal Service's sovereign immunity." Pet. App. 4a. Relying on this Court's decisions in *Franchise Tax Board v. USPS*, 467 U.S. 512 (1984), and *FHA v. Burr*, 309 U.S. 242 (1940), the court noted "the general presumption that a sue-and[-]be-sued clause should be liberally construed." *Id.* at 5a. Given that Congress had "indicated that it wished the Postal Service to be run more like a business than had its predecessor," *id.* (quoting *Franchise Tax*, 467 U.S. at 519-20), and that Congress had launched the Postal Service into the commercial world," *id.* (quoting 467 U.S. at 520), the court held that Congress intended the waiver of sovereign immunity under the Postal Reorganization Act to be broad. *Id.* at 8a.

The court of appeals next "turn[ed] to the second inquiry" under *Meyer*, namely "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Id.* (quoting *Meyer*, 510 U.S. at 484). The court noted that "[t]he source of substantive law upon which Flamingo relies is

federal antitrust law," and reasoned that, "[b]ecause the Postal Service is an entity with the status of a commercial enterprise, it fits within the common meaning of the word 'person,' or 'persons,' wherever used in [Title 15 of the United States Code]." *Id.* at 11a. Indeed, the court noted that "[t]he Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." *Id.* at 10a. The court distinguished *United States v. Cooper Corp.* , 312 U.S. 600 (1941), on the ground that, although a "person" under the antitrust laws does not include the United States, it may include federal entities whose sovereign immunity has been waived. *Id.* Thus, petitioner "fits within the common meaning of the word 'person,' just as does any other private corporation." *Id.* at 11a.

The court stated that petitioner nonetheless could assert "conduct-based" immunity from antitrust liability if it acted "at the direction of a federal sovereign." It explained that: "Accordingly, our holding that the Postal Services does not enjoy status-based immunity does not prevent the Service from asserting conduct-based immunity if the action of the Postal Service being challenged was taken at the command of Congress." *Id.* at 13a.

In addition, the court reinstated the procurement manual claim, *id.* at15a-16a, but affirmed dismissal of a related tort claim because respondents had failed to exhaust available remedies under the Federal Tort Claims Act. *Id.* at 16a-17a. Finally, the court held that the claim under the California Business & Professions Code was preempted by federal law, principally because the standard of review of Postal Service procurement decisions is more deferential under federal law than it would be under California law. Pet. App. 19a-20a.

SUMMARY OF ARGUMENT

In the antitrust laws, Congress provided for suit against any "person" causing antitrust injury. Congress defined the term expansively to "include" "corporations and associations existing under or authorized by the laws of . . . the United States." 15 U.S.C. §§ 7, 12(a). Although this Court in *United States v. Cooper Corp.* , 312 U.S. 600 (1941), excluded the United States itself from the term "person," it subsequently construed the term "person" broadly to apply to both state and foreign governmental entities. *Georgia v. Evans*, 316 U.S. 159 (1942); *Pfizer, Inc. v. Government of India* , 434 U.S. 308 (1978). These decisions are consistent with Congress's intent that, with the narrow exception in *Cooper*, the federal antitrust laws should extend to reach as much anti-competitive behavior as possible. This Court has "repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

This Court has long recognized the distinction between the United States and governmental entities engaged in commerce that can sue and be sued in their own name. *Pierce v. United States*, 314 U.S. 306 (1941); *Reconstruction Finance Corp. v. J.G. Menihan Corp.*, 312 U.S. 81 (1941). Congress enacted the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, to transform the former Post Office Department into an "independent establishment of the executive branch" so that the new entity, the USPS, would "be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board v. USPS*, 467 U.S. 512, 519-20 (1984).

To that end, Congress made the Postal Service more independent of executive branch control, authorized it to compete in the commercial marketplace, and freed the USPS from many government-wide political restraints – such as the Administrative Procedure Act and federal procurement laws –

to enable it to compete more vigorously with private firms. Thus, although the United States does not generally fall within the statutory definition of "person," Congress's designation of the USPS as an independent establishment, its enactment of a sue-and-be-sued clause, and its determination that the USPS compete in the marketplace manifest its intent that petitioner be included within the statutory term "person" under the antitrust laws, just as are state and foreign governmental entities.

ARGUMENT

THE UNITED STATES POSTAL SERVICE FALLS WITHIN THE STATUTORY DEFINITION OF "PERSON" UNDER THE FEDERAL ANTITRUST LAWS AS AN INDEPENDENT ESTABLISHMENT OF THE EXECUTIVE BRANCH ENGAGING IN COMMERCIAL ACTIVITIES WHOSE IMMUNITY HAS BEEN WAIVED BY CONGRESS

Congress intended that the federal antitrust laws apply broadly to all "persons," including governmental entities other than the United States itself. Congress under the Postal Reorganization Act created such a "person" in launching the independent Postal Service into the commercial world, in exempting it from many government-wide rules and regulations, and in authorizing it to sue and be sued in its own name. Petitioner's analysis to the contrary ignores the plain language of the antitrust laws, their underlying goal of preventing the evil of monopolistic behavior, the plain language of the PRA's creation of a distinct commercial entity, and the PRA's underlying purpose of placing the USPS on a competitive footing with private entities in the marketplace.

A. Congress Intended "Person" Under The Federal Antitrust Laws To Be Construed Expansively To Prevent Monopolistic Behavior

Congress created a cause of action for victims of antitrust violations in Section 4 of the Clayton Act. *See* 15 U.S.C. § 15(a) ("any person who shall be injured in his business or property . . . may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . "). Congress used the term "person" in defining who could sue under that cause of action, but did not use that term to identify who could be sued. Some of the substantive antitrust provisions impose obligations only on "[e]very person," 15 U.S.C. § 2 (Section 2 of Sherman Act), or "any person," 15 U.S.C. § 13 (Section 2 of Clayton Act). Section 1 of the Sherman Act, by contrast, simply provides that "[e]very contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce" is illegal. 15 U.S.C. § 1.

There has been no suggestion, however, that by not using the term "person," either Section 4 of the Clayton Act or Section 1 of the Sherman Act applies more broadly than its neighboring provisions. Rather, Congress's omission of the term "person" in those sections highlights the intended breadth of the anticompetitive behavior that Congress wished to deter in all of the federal antitrust laws. "Person" in the context of the antitrust laws is not a term of limitation. Indeed, Congress defined "person" to "include corporations or associations existing under or authorized by the laws of . . . the United States." 15 U.S.C. §§ 7, 12(a). Congress's use of the term "include" in its definition of "person" signifies its intent that a wide variety of entities fall within the scope of the antitrust laws. As this Court stated in *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941), the term "includes"

"connotes simply an illustrative application of the general principle," in this case that "person" apply extensively. *See also American Surety Co. v. Marotta*, 287 U.S. 513, 517 (1933). Congress intended the federal antitrust laws to be applicable broadly to encompass all types of entities.

Despite the plain language, petitioner argues that this Court's decision in *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941), dictates a far narrower construction of the term "person." It asserts that, because the Court held that Congress did not intend to include the United States within the term "person" as used in the antitrust laws, all federal entities should similarly be exempt. Petitioner's claim simply ignores the reasoning in *Cooper*.

In *Cooper*, this Court stated that, as a matter of structure, the statute's use of the generic term "person" in the treble damages section should not be read to cover the United States given that the statute explicitly authorized the United States to sue for injunctive relief and criminally prosecute wrongdoers. *Id.* at 612-13. The Court went on to note that, in each place in the statute where the term "person" is used, "it is obvious that while the term 'person' may well include a corporation, it cannot embrace the United States." *Id.* This structural argument applies solely to the United States as sovereign.

Moreover, as a matter of understanding the specific language in the statute, this Court noted that, even if the United States could qualify as a corporation, the argument that the "United States may be treated as a corporation organized under its own laws . . . seems so strained as not to merit serious consideration." *Id.* at 607. In dissent, Justice Black noted that the majority opinion implied that government corporations, in contrast to the United States itself, would fall within the statutory definition of "person." *Id.* at 615 n.1. Such governmental entities could be construed to be "corporations or associations existing under or authorized by the laws of . . . the

United States." There is no linguistic barrier to suit when a distinct government entity is a litigant. Indeed, the United States in its brief before this Court in *Cooper* stated that the definition of person "admittedly covers a corporation organized under an Act of Congress. The Tennessee Valley Authority, the Reconstruction Finance Corporation, the Smithsonian Institution, and any other federal corporation. . . ." Brief for United States at 32, *United States v. Cooper Corp.*, 312 U.S. 600 (1941) (No. 484).[1]

Cooper, therefore, narrowly applies to the United States. Only the United States can sue for other remedies in the Act, and only the United States under ordinary conventions of language falls outside the requirement of being a "corporation[] or association[] existing under or authorized by the laws of...the United States."

Three additional considerations strongly support an expansive definition of "person." First, subsequent rulings by this Court have explicitly held that Congress intended "person" under the antitrust laws to be broadly construed. Congress intended the antitrust laws to restrain anticompetitive acts of both a public and private nature. One year after *Cooper*, this Court held that states must be considered persons under the antitrust laws, see *Georgia v. Evans* , 316 U.S. 159 (1942). There, this Court described its holding in *Cooper* as not based on any interpretation of "the word 'person' abstractly considered." *Id.* at 161. Rather, interpretation of the word 'person' or

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[1] Congress in 1955 amended the Clayton Act to permit the United States to sue for actual damages under the antitrust laws, 69 Stat. 282, and then for treble damages in 1990, 104 Stat. 2880. In neither case did Congress address the possibility of suit against independent establishments or any other type of federal entities that could sue and be sued. Given that such entities can be "persons" under the antitrust laws, Congress's failure to clarify the scope of the antitrust laws in this respect is not surprising.

'corporation' depends upon its legislative environment." *Id.* *See also Inyo County v. Paiute-Shoshone Indians*, 123 S. Ct. 1887, 1893 (2003) ("qualification of a sovereign as a 'person'" depends "on the legislative environment in which the word appears") (citations omitted); *Ohio v. Helvering*, 292 U.S. 360, 370 (1934) (reiterating that "[w]hether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found"). Because states, unlike the federal government, could not sue for injunctive relief or seek criminal sanctions, this Court concluded that Congress intended their inclusion within the statutory term "person." *Georgia v. Evans*, 316 U.S. at 162-63.

In *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), this Court subsequently held that the statutory term "person" under the antitrust laws includes a foreign nation and therefore permitted the Government of India to maintain suit. [2] This Court also noted that "Congress used the phrase 'any person' intending it to have a naturally broad and inclusive meaning," *id.* at 312, and that "the Sherman and Clayton Acts did not create a 'hard and fast rule of exclusion' of governmental bodies," *id.* at 315 (citation omitted). The touchstone for understanding "person" was "the legislative environment,"

[2] This Court reiterated the reasoning that it had provided in *Georgia v. Evans*, namely that *Cooper* only precluded the United States from being considered a "person" in light of the other remedies provided in the Act. Indeed, the United States at that time similarly was of the view that the "rationale of *Cooper* was that because Congress had given the United States other remedies for enforcing the antitrust laws, it did not intend the government also to be able to sue for treble damages." Memorandum of Amicus Curiae United States at 9, *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) (No. 76-749).

which called for an expansive definition of "person."[3]

Pfizer and *Georgia v. Evans* construed "person" broadly in the context of enabling a governmental entity to sue for antitrust injury. *Cooper* already had made clear, however, that "person" should be construed to have the same meaning in the provisions relating to plaintiffs as in those relating to defendants: "It is hardly credible that Congress used the term 'person' in different senses in the same sentence." 312 U.S. at 606. Accordingly, this Court has held that state agencies also can be sued for antitrust injury. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983) (applying the Clayton Act to purchases by state hospitals); *cf. City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 395 (1978) ("the definition of 'person' or 'persons' embraces both cities and States," whether as plaintiffs or defendants). Moreover, the United States Department of Justice has construed the antitrust laws to permit suits against foreign governmental entities for antitrust violations: "As a practical matter, most activities of foreign government-owned corporations operating in the commercial marketplace will be subject to U.S. antitrust laws." *United States Department of Justice Antitrust Enforcement, Guidelines for International Operations* 3.31 (April 1995).

Second, even prior to *Cooper*, this Court already recognized

[3] Petitioner (Br. at 8-9) mistakenly relies on *International Primate Prot. League v. Tulane Educ. Fund*, 500 U.S. 72 (1991), for the proposition that "when Congress excludes a sovereign from the statutory term 'person,' it equally excludes agencies and instrumentalities of the sovereign." Aside from the fact that – as we will discuss – Congress has designated petitioner to be neither an agency nor an instrumentality, the Court in *International Primate* relied principally on the specific wording in the removal statute that would have made it awkward to include an agency within the term "person," *id.* at 79-80, much as the Court concluded in *Cooper* with respect to the United States, 312 U.S. at 607.

that the term "person" in the antitrust laws included entities with a public rather than private character. In *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U.S. 396, 410 (1889), the Court stated that "combinations among those engaged in business impressed with a public or quasi-public character, which are manifestly prejudicial to the public interest, cannot be upheld." Subsequently, in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 321-22 (1897), the Court reiterated that Congress intended the antitrust laws to apply to entities that serve the public as well as private interest:

> It cannot be disputed that a railroad is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations...But the very fact of the public character of a railroad would itself seem to call for special care by the legislature in regard to its conduct.

The Court therefore held that the public corporation, which was vested with the power of eminent domain, was a "person" under the Act. As the Court stressed three years after *Cooper* in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), "Language more comprehensive [than in the federal antitrust laws] is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse." To that end, this Court has "repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Goldfarb v. Virginia State Bar*, 421 U.S. at 787. Thus, this Court has embraced as broad a construction of "person" as possible, excluding only the sovereign United States itself.

Third, at the time of *Cooper*, courts frequently distinguished between the United States and federal governmental entities

that had distinct identities. The Supreme Court's decision in *Pierce v. United States* , 314 U.S. 306 (1941), decided in the same year as *Cooper*, is instructive. There, the United States charged an individual with impersonating an official of the Tennessee Valley Authority (TVA). The pertinent statute, passed in the era of the Sherman Act, prescribed penalties for those who "falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department." 18 U.S.C. § 76. This Court set aside the penalty, reasoning that impersonating an officer of the TVA, an entity designated "an instrumentality and agency of the Government of the United States," represented a different offense: "The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States." *Id.* at 310. *See United States v. Strang*, 254 U.S. 491 (1921) (arriving at a similar conclusion with respect to officer of United States Shipping Board Emergency Fleet Corp.). To the Court, the generally understood distinction between the United States and sue-and-be-sued entities such as government corporations was clear.[4]

Two months prior to *Cooper*, this Court considered whether another sue-and-be sued entity – the Reconstruction Finance Corporation (RFC) – could be subject to costs in a suit to enjoin infringement of trademarks. *Reconstruction Finance Corp. v. J.G. Menihan Corp.*, 312 U.S. 81 (1941). The Court concluded that the federal entity should be subject to costs, principally

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[4] *See also Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922) (holding that the United States Shipping Board Emergency Fleet Corporation, which the Court termed an "instrumentality of the Government of the United States," could not be treated as the "United States" for purposes of Court of Claims jurisdiction and for purposes of a bankruptcy statute).

because "[w]hile it acts as a government agency in performing its functions . . . still its transactions are akin to those of private enterprises." *Id.* at 83. Further, "the unqualified authority to sue and be sued placed [the RFC] upon an equal footing with private parties." *Id.* at 85. Thus, at the time of *Cooper*, this Court treated the United States and independent federal entities that could sue and be sued in their own name quite differently.

That distinction also was evidenced in *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), which addressed whether a Regional Agricultural Credit Corporation, chartered by the RFC, could be subject to a negligence suit arising out of an alleged breach of contract. Even though Congress had not included a sue-and-be-sued clause in creating the Regional Agricultural Credit Corporation, this Court held that Congress nonetheless had intended the governmental entity to be subject to suit – "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Id.* at 390. The Court further explained that, "[b]ecause of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for government ends." *Id.* It went on to note that Congress had waived the immunity for almost all governmental corporations, and that "[s]uch a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor." *Id.* at 390-91. The Court concluded that, in light of Congress's decision to make the RFC amenable to suit, it likely intended that its subsidiary, the Regional Agricultural Credit Corporation, would similarly be subject to suit under generally worded contract and tort actions. *Id.* at 394. Accordingly, the Court permitted the common law contract action to proceed.

In sum, in *Pierce*, *J.G. Menihan*, and *Keifer & Keifer*, this Court recognized the distinct nature of governmental entities that engage in commercial transactions and can sue and be sued. In those opinions, the Court stressed the different identities and obligations of those governmental entities that Congress had directed to act more in line with entities in the private sector. Thus, the Court that decided *Pierce* and the two RFC cases would not likely have considered its exclusion of United States from the term "person" to apply to other governmental entities of a different character.

Several lower courts similarly have concluded that the TVA – an "instrumentality and agency of the United States," 16 U.S.C. § 831r, whose immunity has been waived by Congress -- falls within the statutory term "person" in the federal antitrust laws. *In re Uranium Industry Antitrust Litigation*, 458 F. Supp. 1223 (J.P.M.L. 1978); *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D. Pa. 1962). The courts agreed with the TVA that its distinct identity suggested that it should be able to sue in its own name for antitrust injuries. Because Congress intended the TVA to stand on a footing separate from that of the United States, the courts permitted the TVA to sue as a "person" under the antitrust laws: "If we are to read the statutory language in its 'ordinary and natural sense,' as we are enjoined in *Cooper*, it would appear incontestable that TVA is a 'person' within the meaning" of the Act. *General Electric*, 209 F. Supp. at 203.

Moreover, pursuant to this Court's reasoning in *Georgia v. Evans*, given that the TVA cannot obtain alternative remedies such as criminal sanctions, then it is only logical to assume that Congress intended to include it as a "person" within the

meaning of the federal antitrust laws. [5] Concluding that the TVA was a "person" under the antitrust laws allowed it to sue in its own name and thus vindicate its interests independent of any action of the United States.

Instead of focusing on the pertinent language in the antitrust laws or on the reasoning in *Cooper*, *Georgia v. Evans*, and *Pfizer*, petitioner stresses (Br. at 9-10) the lower court decisions holding that federal agencies and instrumentalities that cannot be sued in their own name do not fall within the statutory term "person" under the antitrust laws. *See, e.g.*, *Sea-Land Serv. Inc. v. Alaska R.R.* , 659 F.2d 243 (D.C. Cir. 1981) (Alaska Railroad and its supervising United States agencies); *Jet Courier Servs., Inc. v. Federal Reserve Bank* , 713 F.2d 1221 (1983) (Federal Reserve Banks); *Rex Systems, Inc. v. Holiday*, 814 F.2d 994 (4th Cir. 1987) (Department of the Navy); *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985) (Southeastern Power Administration); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1980) (Army and Air Force Exchange Service). Those decisions, however, neither address the status of the Postal Service nor focus on (or even discuss) whether a governmental entity that Congress has vested with a distinct identity, substantial independence, and the power to sue and be sued should similarly be considered a "person" within the meaning of the federal antitrust laws.

To this point, respondents have demonstrated that Congress intended "person" in the federal antitrust laws to be understood broadly. Although*Cooper* excluded the United States from the reach of "person," the reasoning in *Cooper*, as well as decisions such as *Georgia v. Evans*, *J.G. Menihan*, and *South-Eastern*

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[5] *But see Webster County Coal Corp. v. TVA*, 476 F. Supp. 529, 532 (W.D. Ky. 1979) (holding that the TVA, "as an agency and instrumentality ofthe federal government, is exempt from liability under the antitrust laws").

Underwriters Ass'n immediately thereafter, reveal the narrowness of the *Cooper* decision. Congress sought to reach anticompetitive conduct irrespective of whether the conduct could be considered private or public. We show below that Congress in creating the USPS under the Postal Reorganization Act in 1970 intended the USPS to be the type of entity that – like state and foreign governmental entities – falls within the statutory definition of "person."

B. The "Independent Establishment" Of The USPS Created By The Postal Reorganization Act Is A "Person" Under The Antitrust Laws

Through the Postal Reorganization Act, Congress dramatically altered the status of the former Post Office Department. First, it granted the USPS far more independence than its predecessor, the United States Post Office, had enjoyed. Second, it launched the USPS into the commercial world, authorizing it to compete with private firms in the marketplace. Third, it freed the USPS from many of the administrative constraints facing other federal entities so that it could compete more effectively in the marketplace. Finally, it provided the USPS with a distinct identity, directing that it could sue and be sued in its own name. Taken together, these factors convincingly demonstrate that petitioner is a "person" within the meaning of the federal antitrust laws.

Petitioner devotes much of its brief to the uncontested proposition that the new USPS must be viewed as part of the federal government. The critical question, however, is not whether the USPS is governmental, but whether its independence, distinct status, and unique characteristics reflect Congress's determination that the USPS is the type of entity that, like state and foreign governmental entities, falls within the scope of the antitrust laws as a "person."

1. Creation of the USPS as an Independent Establishment

Congress designated the USPS as "an independent establishment of the executive branch," 39 U.S.C. § 201, eschewing the terms agency or instrumentality. Indeed, petitioner in its brief frequently misstates the designation, variously calling it an "agency,"[6] an "instrumentality" and an "establishment." Br. at 6, 10, 24, 31, 33. Congress designated the USPS as an "independent establishment of the executive branch," not an agency, not an instrumentality, and not **in** the executive branch.[7] Congress's wording highlights its intent that

[6] Despite the USPS's contention here, it has argued elsewhere that the Postal Service should not always be considered a federal agency. For instance, in *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071 (Fed. Cir. 2001), the USPS had argued that it was not subject to Court of Federal Claims jurisdiction because it was not a federal agency as specified under the Administrative Dispute Resolution Act of 1996 (ADRA), 28 U.S.C. § 1491(b)(1). Petitioner itself therefore has urged that terms like "agency" or "instrumentality" refer to different entities depending on the context. *See also* Brief of Amicus Curiae United States at 21, *Arkansas v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821 (1997) (No. 95-918) ("Numerous cases in the lower courts have recognized that an entity may be a 'federal instrumentality' for some purposes but not others.")

[7] Congress has not conferred similar powers on all "independent establishments of the executive branch." The term "independent establishment" – like agency or instrumentality – does not have any set meaning. Congress intended most independent establishments to operate with little direct control from the executive branch. To take one example, Congress in 2000 created the Vietnam Education Foundation as an independent establishment of the executive branch. It established a thirteen-member Board of Directors that included three executive branch officials, six non-governmental individuals "who have academic excellence or experience in the fields of concentration," two members of the House of Representatives, and two members of the Senate. 22 U.S.C. § 2452. No provisions specifying how the officials could be removed from office were included.

petitioner be granted a unique governmental status.[8]

The PRA's structure also plainly manifests the USPS's unique independence. Congress in the PRA removed the Postmaster General from a position within the President's cabinet. Instead, Congress directed the President to appoint nine governors of the USPS, who can only be removed for cause. 39 U.S.C. § 202. Congress vested in the governors – not the President – the exclusive power to hire and fire the Postmaster General at will. 39 U.S.C. § 202(a). As the D.C. Circuit has stressed, "the Board of Governors was to have policy control with functions similar to a board of directors" and be "independent of ordinary legislative and executive control." *Mail Order Ass'n of America v. USPS*, 986 F.2d 509, 519 (D.C. Cir. 1993) (citations omitted). The Postal Service's new structure reveals its separation from the President and

[8] Indeed, in defining federal governmental organizations, Title V of the United States Code treats the Postal Service differently than other federal entities. Congress first defined executive departments in 5 U.S.C. § 101, which does not include the Postal Service, defined military departments in Section 102, and then included governmental corporations in Section 103. In Section 104, Congress defined "independent establishment" to mean "an establishment in the executive branch (other than the United States Postal Service . . .) which is not an Executive Department, Military Department, Government Corporation or part thereof." And, in Section 105, Congress defined "executive agency" as "an executive department, a Government corporation , and an independent establishment." The Postal Service uniquely falls outside all of those definitions in Title V, and courts have relied on that omission in holding that certain broadly applicable government rules do not apply to the Postal Service. *See, e.g.*, *Kane v. MSPB*, 210 F.3d 1379 (Fed. Cir. 2000) (addressing a former version of the Hatch Act); *Cooper v. USPS*, 2001 U.S. Dist. LEXIS 19259 (N.D. Ill) (holding that 5 U.S.C. § 5545a not applicable to Postal Service investigators); *Hayes v. United States*, 20 Cl. Ct. 150 (1990) (holding that 5 U.S.C. § 4503 is not applicable to USPS employees).

conventional political controls.

The PRA freed the USPS from bureaucratic reins as well. As the USPS asserts in its brief (at 25), the PRA minimized "direct political supervision" of the Postal Service and instilled it with "greater bureaucratic independence." The Board of Governors, not Congress, was to assume operational control. As the USPS further (at 13) explains, "Congress could no longer manage such administrative details itself." The Postal Service thus enjoys greater autonomy than most other federal governmental entities.

Congress left the USPS well equipped to exercise that autonomy. It granted to the USPS the powers, among other authorities, "to enter into and perform contracts, execute instruments and determine the character of and necessity for, its expenditures," 39 U.S.C. § 401(3), "to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents," *id.* § 401(4), and "to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it" *id.* § 401(6).

In other circumstances, the USPS successfully asserted that it is not the United States. For example, although "[c]opyright protection is not available for any work of the United States Government," 17 U.S.C. § 105, the USPS has sought copyright protection for hundreds of works it has registered through the U.S. Copyright Office. U.S. Copyright Office, "Books, Music, etc." database (Sept. 9, 2003) (search for registered works where "United States Postal Service" is listed as claimant yielded 325 results), http://www.copyright.gov/records/. Indeed, one court previously differentiated the USPS from the United States in the context of an antitrust suit. In *United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978), the United States brought suit under the Sherman Act against AT&T. The defendant sought to discover documents in the

possession of the USPS. The USPS, however, argued that it was not a "party" to the action as required under Fed. R. Civ. P. 45. *Id.* at 1330 n. 49, 1332 n. 52. The district court agreed with the Postal Service's position, stressing its unique position within the government. *Id.* at 1335-36.

Ignoring the gist of its position in other fora, petitioner now argues (Br. at 21) that it should be treated as identical to the United States under the antitrust laws: "If Congress, in enacting the PRA, had intended to subject the Postal Service to statutes that otherwise exclude the United States, such as the antitrust laws, Congress naturally would have been expected at least to provide that the Postal Service is **not** an agency or establishment of the United States." Petitioner's argument glosses over the USPS's designation as an "independent establishment," and other provisions of the PRA, as we will discuss, underscore the USPS's status separate from the United States.

Indeed, despite its arguments in this case, the USPS itself at times has argued that it falls within the statutory term "person," even when the United States cannot. For instance, the Securities Act of 1933, 15 U.S.C. § 77c(a)(2), exempts securities issued by "any person controlled or supervised by and acting as an instrumentality of the Government of the United States." Petitioner argued that it was exempt because it was "designated by 39 U.S.C. § 201 as 'an independent establishment of the Executive Branch of the Government of the United States' and, therefore, comes within the definition of person." *USPS*, SEC No-Action Ltr., 1971 SEC No-Act. LEXIS 2205 (Aug. 27, 1971). Based on the USPS's representations, the chief counsel of the SEC issued a letter recommending no action to the SEC. *Id.* As the USPS argued to the SEC, Congress's intent to create a distinct entity independent of the United States is clear.

2. Authorization to Engage in Commercial Activities

In addition to enhancing USPS's autonomy, Congress in the PRA considerably broadened the authority of the USPS to determine which activities to pursue. Instead of just delivering mail, Congress granted the USPS greater freedom to determine what products to offer and how to market its wares. Congress vested the USPS with the discretion to "provide, establish, change or abolish special **nonpostal** or similar services." 39 U.S.C. § 404(a)(6) (emphasis added).

Under the PRA, the structure of the USPS resembles that of a private corporation, and the Postmaster General has authority analogous to that of a corporate chief executive. *Id.* The list of powers under the PRA reads like the provisions in a corporate charter. Indeed, unlike other federal entities, Congress directed the USPS to be self sustaining – revenues are to be offset against all costs. *Id.* § 2401[9] Congress also adopted the private sector labor-management relations statute, the National Labor Relations Act (NLRA), to govern collective bargaining between labor and management. *Id.* § 1209.[10]

Although petitioner argues (Br. at 24-25) that Congress's decision not to designate the USPS as a government corporation supports its position, whether Congress labeled the USPS a government corporation or an "independent establishment" (albeit with a corporate structure) should not be determinative of whether it is a "person." The PRA establishes an entity that is charged with operating like a business, with its governance and labor management relations modeled upon the practices of

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[9] *See Franchise Tax Board*, 467 U.S. at 520 n.13.

[10] *See* Ann Marie Hauck Walsh, *The Public's Business: The Politics and Practices of Government Corporations* 35 (MIT Press 1978) (The USPS was the "[f]irst federal agency whose employment policies are governed by collective bargaining").

its private counterparts. As the General Counsel for the USPS, shortly after the PRA's enactment, stressed:

> although officially designated as 'independent establishment' it is clear that Congress intended the Postal Service to operate, in many respects, in the same manner as a corporate entity . . . substantially the same corporate characteristics are vested in the Postal Service as an 'independent establishment' as would have been available to it as a government corporation.

USPS, SEC No-Action Ltr., 1971 SEC No-Act. LEXIS 2205. Indeed, the Postal Service argued, and the Treasury Department agreed, that it should be included within the term "corporation" under the 1934 Securities Exchange Act, 15 U.S.C. § 78c(a)(12). *Id.*; *see also* 36 Fed. Reg. 21,365 (1971) (Treasury Department designation).[11]

As a consequence, and without direction from Congress, the USPS has launched an array of new products. It not only competes with entities such as United Parcel Service (UPS) and Federal Express for express mail, it also has marketed online billing services, phone cards, and greeting cards. President's Commission on the United States Postal Service, *Embracing the Future* 27 (July 31, 2003). The USPS's use of www.usps.com is emblematic of the commercial focus. As this Court recognized in *Loeffler v. Frank*, 486 U.S. 549 (1988), Congress has given the USPS the "status of a private commercial enterprise." 486 U.S. at 558 (citation omitted).

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[11] As John Tierney, whom petitioner cites extensively (Br. at 11, 12, 13, 26), summarized: "The architects of the reorganization believed that the mail delivery system was essentially a business operation that could be managed more efficiently and effectively if it were converted from an old-line cabinet agency to a government corporation." John T. Tierney, *Postal Reorganization* 1 (Auburn Press 1981). *See also* Walsh, *supra* note 10, at 35 (characterizing USPS as a government corporation).

Congress's decision to direct the USPS to carry out commercial activities complements that entity's comparative administrative independence. Congress created an independent establishment to compete in the commercial world.

3. Release From Government-Wide Administrative Constraints

Governmental entities typically are constrained by a welter of political checks, including congressional oversight, executive appointment and removal, notice-and-comment rulemaking, executive orders, and the like. Congress creates government corporations and "independent establishments" to free governmental entities from at least some of such constraints and facilitate greater market-based behavior. This Court has explained in a similar context that

> [a]n important, if not the chief, reason for employing a corporate agency was to enable the Government to employ commercial methods and to conduct the operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure and with it control over the financial operations of the United States.

United States Shipping Board Emergency Fleet Corp. v. Western Union, 275 U.S. 415, 423 (1928).

Under the PRA, Congress specified in Section 410(a) that "[e]xcept as provided," no generally applicable federal laws addressing "public or federal contracts, property, works" etc. apply to the exercise of power by the USPS. Section 410(a) is pivotal – in one plain step Congress placed the USPS outside the very framework governing nearly all other federal governmental entities. Congress's intent to free the USPS from many government-wide rules and regulations could not be more clear. *See Air Courier Conference of America v. APWU*, 498 U.S. 517, 512 (1991) (noting import of § 410(a) in placing

USPS outside of government-wide regulations); *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1084 (Fed. Cir. 2001) (same).

In subsection (b), Congress provided a list of statutes regulating the federal government that it wished to apply to the Postal Service. For instance, that subsection directs the USPS to comply with the Freedom of Information Act and the Privacy Act, among others.

With the exception of the statutes listed in Section 410(b), the PRA thus released the USPS from fundamental laws and regulations governing most governmental entities. For instance, the Administrative Procedure Act does not apply and therefore cannot constrain the USPS's choice of whether to sell calling cards or whether to sponsor Lance Armstrong's professional cycling team. Moreover, Congress in the PRA declined to mandate that the USPS comply with the same procurement laws widely applicable to other federal entities. As the recent Presidential Task Force summarized, "The 1970 Act appropriately grants the Postal Service latitude to conduct its procurement with fewer substantial regulations and statutes than those governing Federal purchasing generally." *Embracing the Future*, *supra*, at 95. Yet, as a result, the USPS need not adhere to the competitive principles embedded in the Federal Acquisition Regulations (FAR). Finally, for rate adjustments in the transport of mail, the USPS must apply to the watchdog agency, the Postal Rate Commission. 39 U.S.C. § 3601(a). But, for other commercial initiatives, it is on its own. The GAO has confirmed that the Postal Service's new commercial offerings "are not subject to the same regulatory scrutiny by the Postal Rate Commission (PRC) that postal activities currently face." GAO Rep. No. 03-812 *U.S. Postal Service: Key Political Transformation Issues* 6 (July 13, 2003). Congress through the PRA therefore created a distinct entity subject to different political and regulatory checks than

governmental entities more generally.

4. Enactment of the Sue-and-Be-Sued Clause

Congress in 1970 waived the Postal Service's immunity from suit, providing the USPS with the power "to sue and be sued in its official name." 39 U.S.C. § 401(1). The repeal of immunity in Section 401(1) represents a key aspect of Congress's effort to instill in the Postal Service a different character, and reflects its view that the USPS is a distinct person.

The USPS evidently is convinced that Congress vested it with greater entrepreneurial freedom with few strings attached. It all but ignores the fundamental tradeoffs in the PRA – "greater bureaucratic independence" in exchange for greater amenability to suit. The sue-and-be-sued clause must be read in conjunction with Congress's decision to make the USPS far more independent and launch it into the commercial world. Given that the Administrative Procedure Act (APA) and the federal procurement (among other) regulations do not apply, Congress intended that the USPS be subject to private litigation to restrain wrongdoing. As this Court stated in *Franchise Tax Board*, 467 U.S. at 520, "we must presume that the Service's liability is the same as that of any other business."[12]

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[12] Such waivers can benefit the newly created entities by encouraging private entities to contract with federal entities at reasonable prices. As a treatise explained some seventy-five years ago, "If the immunity of the government from suit without its consent were extended to government corporations engaged in economic enterprises, not only would much injustice result, but the activity of the corporation would be hindered, on the one hand because those who were expected to do business with the corporation would be suspicious of making engagements with it if they were uncertain whether these engagements could be enforced, and on the other because the corporation itself would not know what its rights and obligations were." John Thurston, *Government Proprietary Corporations in the English-Speaking Countries* 43-44 (Harvard U. Press 1937).

In addressing Congress's waiver under the PRA, this Court's opinion in *Franchise Tax Board* strongly supports the decision below. There, this Court held that Congress had waived the USPS's immunity from state administrative orders to withhold monies that its employees owed to the state taxing authority. The USPS had argued, much as in this case, that it did not fall within the term "person" under the California Unemployment Insurance Code – "the term 'person' generally does not refer to the United States or its agencies because the statutory term 'person' generally does not refer to sovereigns." Brief for the USPS at 47-48, *Franchise Tax Board v. USPS*, 698 F.2d 1029 (9th Cir. 1980) (No. 80-5700). The court of appeals rejected the argument, 698 F.2d at 1032, and this Court held that imposing the state law obligation on the USPS furthered congressional intent that the USPS be treated like a private entity. Citing *FHA v. Burr*, 309 U.S. 242 (1940), this Court explained that "we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. . . [W]hen Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." 467 U.S. at 517-18. Congress's waiver presumptively subjected the USPS to liability under the generally worded statutory scheme that included the garnishment order in the case.

Moreover, Congress under the PRA attached specific conditions to the waiver of immunity for the USPS. These provisions show that Congress considered the ramifications of waiving the USPS's immunity, and yet included no mention of the antitrust laws. For instance, Section 409(b) provides that "the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States" is involved should also apply in suits against the

USPS despite the general waiver. Congress took care to protect the USPS by ensuring that favorable statutes of limitation should apply, and that it be protected from suit in unfavorable fora.

In addition, Congress provided in Section 409(a) that "United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28." Thus, Congress made sure that, despite the waiver of immunity, the USPS – unlike Federal Express or UPS – could remove any case filed in state court to federal court.

Furthermore, in Section 409(c) Congress directed that the tort claims brought against the Postal Service conform with the procedures and limitations set out under the Federal Tort Claims Act. Congress therefore exempted the USPS from jury trials in tort cases and imposed an exhaustion of remedies requirement, which the court below relied on in this case. Pet App. 15a-16a. Moreover, by limiting the waiver, Congress ensured that all allegedly tortious acts stemming from the "discretionary functions" of USPS officials would also be protected. Congress therefore was careful to carve out explicit exceptions to protect the USPS even while waiving its immunity. In light of the special rules governing venue, tort claims, and the like, the lack of any reference to the federal antitrust laws strongly suggests that no such limitation to the general waiver was intended. Congress made plain the contexts in which the Postal Service was to be treated differently than private entities.

This Court's decision in *Loeffler* reinforces that conclusion. There, in upholding an award of pre-judgment interest against the Postal Service in a Title VII case, the Court stressed the significance of the conditions that Congress had attached to the

sue-and-be-sued clause to limit the USPS's liability. *Id.* at 561-62. According to the Court, the presence of the specific limitations indicate that a court should not of its own accord imply any other limitation. *Id.* at 557. The Court summarized: By "including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of immunity' and given it the 'status of a private commercial enterprise.'" *Id.* at 556.[13] Thus, the Court was persuaded by the PRA that Congress intended the USPS to be treated akin to a private sector entity and not the United States for purposes of Title VII.

Moreover, petitioner's brief ignores rulings by lower courts in settings similar to the federal antitrust laws that have held that the USPS can be sued under congressionally created causes of action exposing "persons" to liability. For instance, in *Global Mail Ltd. v. United States Postal Service*, 142 F.3d 208 (4th Cir. 1998), the USPS argued, much as it does here in the context of the antitrust laws, that the Lanham Act did not reach the USPS's conduct. At that time, the Lanham Act authorized suit against all "persons" including "organizations capable of being sued," 15 U.S.C. § 1127,[14] and permitted treble damages. 15 U.S.C. § 1117(a). The USPS asserted that the Lanham Act

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[13] As this Court more recently stated in *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992): "We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in . . . the context of equally broad 'sued and be sued' clauses." In other words, in the sue and be sued context, this Court has assumed that such waivers are intended to be broad, limited only by the explicit exceptions. The exceptions under the PRA do not limit suits under the federal antitrust laws.

[14] The Lanham Act since has been amended to include the United States specifically within the terms of the statute, 15 U.S.C. § 1127, and suit for treble damages is still authorized. Petitioner's citation (Br. at 9) to the Lanham Act reflects the amended version.

did not allow suit against it because it did not fall within the term "person" and because "the Act's definition of 'person' as an organization capable of being sued falls short of the standard of explicitness required for such a waiver." *Id.* at 216.

The court of appeals rejected the argument, reasoning that "a federal agency whose sovereign immunity has been waived... [and is] engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association.'" *Id.* The Sixth Circuit subsequently agreed with the reasoning in *Global Mail* , adding that "[w]e cannot conclude that Congress intended § 409 simultaneously to launch USPS into the commercial world and also to immunize USPS from liability for federally-created commercial torts such as the Lanham Act." *Federal Express Corp. v. United States Postal Service*, 151 F.3d 536, 546 (6th Cir. 1998) (citations omitted). *See* also *United States v. Q International Courier, Inc.*, 131 F.3d 770, 775 (8th Cir. 1997) (similarly holding that USPS is a "person" under the Lanham Act). Pursuant to the PRA waiver, Congress intended to subject the USPS to the same rules of the game played by its competitors.

Indeed, the USPS has acted as a "person" under federal statutes, seeking protection under the Lanham Act for trademarks asserted in its own name. *See* U.S. Patent Office, "Trademark Electronic Search Systems" database (Sept. 10, 2003) (search for registered marks where United States Postal Service is listed as owner yielded 464 results, including one filed in 1972), http://www.uspto.gov/main/trademarks.htm. Thus, when to its advantage, the USPS has no quarrel with its characterization as a "person" under generally worded federal statutes. As the *Federal Express* court noted, "Despite its assertion that it is not a Lanham Act 'person' when it is accused of overstepping the confines of that Act, USPS has, in other contexts, been quick to behave as a Lanham Act 'person' in protection of its perceived rights under that enactment.

Rudimentary notions of justice and fair play reinforce the conclusion, already amply supported by the plain language of the operative statutes, legislative history, and judicial interpretations" that Congress intended the USPS to be a "person" under the Lanham Act. 151 F.3d at 546.

Petitioner's arguments in this case cannot be squared with the reasoning in the above decisions from the Fourth, Sixth and Eighth Circuits. Courts have distinguished between the United States and the USPS,[15] concluding that Congress's waiver under the PRA was intended to expose the Postal Service to liability under a variety of causes of action for its activities in the commercial sector in contexts in which the United States would not be liable. Petitioner has offered no other purpose for the waiver.

Petitioner suggests (Br. at 19) that, in light of *FDIC v. Meyer*, 510 U.S. 480 (1994), the significance of the sue-and-be-sued clause is limited to waiving sovereign immunity, and it does not provide any indication that USPS is a person under antitrust laws. Petitioner misreads *Meyer*.

In *Meyer*, although this Court agreed that Congress had waived the general immunity of the Federal Savings and Loan Insurance Company (FSLIC), a governmental instrumentality, the particular cause of action asserted in that case – a constitutional tort under *Bivens* – did not permit a route to sue. This Court had never intended that the *Bivens* route be used against governmental entities as opposed to governmental officials, whether or not the agencies retained immunity. *Id.* at 484-85. Nor were constitutional tort actions available against

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[15] Courts had held that the United States, in contrast to the Postal Service, did not fall within the statutory definition of "person" under the Lanham Act. *See Preferred Risk Mutual Insurance Co. v. United States*, 86 F.3d 789 (8th Cir. 1996). Courts thus differentiated the United States from the Postal Service for purposes of defining "person."

private entities. Thus, no cause of action against FSLIC could lie.[16] *Meyer* in no way signaled that Congress must specifically list a governmental entity whose immunity has been waived as a defendant before permitting suit to proceed.

Rather, when Congress waives the immunity of a federal governmental entity, courts must inquire whether Congress intended the entity, despite the waiver, to be exempt from a generally applicable cause of action. Prior to the PRA Congress and states passed a multitude of statutes imposing responsibilities and liabilities on individuals, corporations, and other entities. Some, like the federal antitrust laws, the Lanham

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[16] The court below recognized *Meyer*'s "two-step inquiry in analyzing whether a federal instrumentality enjoys immunity from a particular substantive area of the law." Under this analysis, "'[t]he first inquiry is whether there has been a waiver of sovereign immunity.' If there has been, 'the second inquiry . . [is] whether the source of substantive law upon which the claimant relies provides an avenue for relief.'" Pet. App. 4a. Following *Meyer*, the court initially determined that the PRA waived the Postal Service's immunity from suit, as the Postal Service recognizes as well. Pet. App. 5a. Second, "[h]aving determined that Congress has waived the Postal Service's immunity, we turn to the second inquiry. . . . The source of substantive law upon which Flamingo relies is federal antitrust law." Pet App. 8a. Thus, petitioner's assertion (Br. at 19) that "the Ninth Circuit below did not undertake to determine whether there was an independent substantive basis under the antitrust laws for imposing liability against the Postal Service" blinks reality. The court below concluded that the USPS fell within the statutory definition of "person," "[b]ecause the Postal Service is an entity with the status of a private commercial enterprise. . . . akin to a private corporation." Pet App. 11a, 13a. To the court, although "person" did not include the United States as sovereign, the USPS as a sue-and-be-sued entity "fits within the common meaning of the word "person" just as does any other private corporation." Pet. App. 11a.

Act, and RICO[17] direct that all "persons" be liable, including corporations and associations organized under the laws of the United States. Similarly, the California Unemployment Insurance Code imposes obligations on "persons," as does the Federal Communications Act.[18] In enacting the broad waiver in the PRA, it would have been impracticable for Congress to consider every possible cause of action to list whether the USPS should be subject to suit in each one. If there is no applicable cause of action, as in *Meyer*, then no liability should lie. However, "when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." *FHA v. Burr* , 309 U.S. at 245. Given Congress's determination to make the Postal Service independent and launch it into the commercial world, and given that Congress carved out specific exceptions not including the antitrust laws from the waiver of immunity, Congress intended that the USPS be subject to suit as a "person" under the federal antitrust

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[17] *See Miller v. Gould*, 1990 U.S. Dist LEXIS 5934 (N.D. Ill. 1990) (holding that USPS is a "person" within meaning of RICO).

[18] The FCC in *In re Graphnet Systems, Inc.*, 73 F.C.C.2d 283 (1979), No. 79-2243 (D.C. Cir. Oct. 14, 1980), *vacated as moot sub nom. United States Postal Serv. v. FCC*, No. 79-2243 (D.C. Cir. Oct. 14, 1980), held that the Postal Service fell within the term "person" under its statutory scheme, which was defined to include "an individual, partnership, association, joint -stock company, trust or corporation." 47 U.S.C. § 153(i). Citing *Cooper*, the Commission explored the underlying intent of both its Act and the PRA, and concluded that the Postal Service should be construed as a "person" because the "non-governmental nature of the Postal Service's activities is especially apparent when it engages in competition with private enterprise." *Id.* at 292.

laws.[19]

Finally, in light of Congress's overall intent to create parity between the USPS and other businesses, it would be incongruous to conclude that Congress wished to launch the Postal Service into competition with entities such as Federal Express or UPS with respect to express mail and other services and yet immunize the USPS from the same antitrust constraints that promote competition amongst its competitors. Nor is it likely that the USPS's liability would be "the same as that of any other business," *Franchise Tax Board*, 467 U.S. at 520, if it could conspire to set prices or engage in other means of restraining competition without fear of the antitrust laws. [20] Thus, this Court's admonition in *Franchise Tax Board* that "we believe Congress intended the Postal Service to be treated similarly to other self-sustaining commercial ventures," 467 U.S. at 525, strongly supports inclusion of petitioner as a "person" under the federal antitrust laws.

C. Recognizing That The USPS Is A "Person" Under The Antitrust Laws Does Not Preclude Immunity For USPS Actions Directed By Congress

The court below recognized that some USPS activities are governed by specific congressional directives, such as the

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[19] *See also Pennsylvania Dep't of Environmental Resources v. USPS*, 13 F.3d 62 (3d Cir. 1993) (holding that the USPS, unlike the United States, can be sued for steep penalties under the Clean Water Act in light of the USPS's distinct structure and functions).

[20] The FCC determined that the Postal Service was "a proprietary enterprise which, like other government-owned entities that have been found subject to regulation, has been organized in a form similar to commercial ventures, and its unregulated entry into a competitive marketplace could seriously jeopardize achievement of the goals embodied in the Communications Act." 73 F.C.C. 2d at 297.

mandate that USPS exercise a monopoly over the carriage of U.S. letter mail. 39 U.S.C. § 201(a). As a consequence, the court provided that the Postal Service as a "person" under the antitrust laws would continue to be protected by a "conduct-based immunity." Pet. App. 13a. According to the court, the USPS cannot be sued under the antitrust laws for carrying out its legislative mandate, but only for acts unconnected to the legislative will that are anti-competitive. When the USPS exercises a monopoly conferred upon it by Congress, no liability can lie. However, if the USPS without congressional authorization conspires with another company to hold down prices paid to suppliers, creates an illegal tying arrangement, or conspires to prevent competition in production of mail sacks, then no immunity would attach.[21] Liability in such contexts would protect the public and further Congress's goal in the PRA to make the USPS more efficient.

Petitioner argues nonetheless (Br. at 28-29) that the conduct-based immunity might be too porous to protect the USPS's interests. Yet, this Court has recognized the salience of the conduct/status distinction in the closely related setting of antitrust suits against state governmental entities.

Under the so-termed state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), this Court has held that the conduct of state agencies directed by state legislatures is exempt from the federal antitrust laws. In that case, decided two years after *Cooper*, a California raisin producer sued state officials for

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[21] Petitioner asserts (Br. at 29) that antitrust immunity might interfere with the Postal Service's discretion in procurement. Congress has not determined that monoplistic procurement practices are vital to any congressional goal. To the contrary, Congress's enactment of the Robinson-Patman Act evinces its recognition of the antitrust evils that arise from price discrimination. *See Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983) (applying Clayton Act to state entities' purchase of goods).

implementing a state-wide program that limited raisin production in order to stabilize prices across the state. This Court did not hold that the state defendants fell outside the Act's definition of "person"; rather it held that Congress never intended the antitrust laws to restrain a "state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. Given that the raisin program "derived its authority and its efficacy from the legislative command of the state," no antitrust liability could attach. *Id.* at 350. Thus, when a state agency acts at the direction or command of the legislature, it is immune from the reach of the antitrust laws. Governmental entities can be immune from antitrust liability for some actions yet subject to suit for others.

When a state agency or political subdivision acts outside of legislative direction, the *Parker v. Brown* doctrine is no impediment to suit. For instance, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), this Court followed *Parker v. Brown* in holding that an antitrust action could proceed against a state agency when the agency was not acting pursuant to the "legislative command" of the state. An attorney had sued the Virginia State Bar under the antitrust laws, challenging the agency's decision to set and enforce minimum fee schedules for attorneys. This Court explained that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign." 421 U.S. at 790. The Court concluded that the activities of the state bar in publishing and enforcing the schedules were not "required" by the state and did not derive closely from the legislative command. *Id.* at 791-92.

Participating as amicus in *Goldfarb*, the United States filed a brief urging the result ultimately adopted by this Court. *See* Brief for the United States at 34-48, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (No. 74-70). Moreover, the United

States has sued state agencies for anticompetitive acts not stemming from the "legislative command" of the state.[22] The United States evidently believes that the *Parker v. Brown* defense is sufficient for preserving the legitimate sovereign prerogatives of state agencies.

The Ninth Circuit's embrace of conduct immunity in this case, therefore, follows the doctrine articulated in cases decided under *Parker v. Brown*. State entities that market calling cards or online payment services would still enjoy immunity from antitrust claims where the alleged anti-competitive behavior stemmed from legislative direction, but not for commercial activities unconnected to the legislative will.

The Ninth Circuit's conduct immunity sufficiently safeguards the USPS's sovereign functions and accords with Congress's intent under the PRA. Through its enactment of a statutory monopoly, Congress has exempted the Postal Service from antitrust scrutiny for such acts. But, for commercial actions unconnected to the legislative monopoly, there is no legislative intent to preclude antitrust review.[23] Indeed, review of such commercial actions – as for state entities – comports with Congress's design in creating the USPS as an independent commercial entity that can sue and be sued in its own name.

Petitioner complains (Br. at 27-28), however, that application

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[22] As then Judge Breyer noted in *FTC v. Monahan*, 832 F.2d 688 (1st Cir. 1987), "a subordinate governmental unit enjoys antitrust 'immunity' only when it acts pursuant to a 'clearly articulated and affirmative expressed' state policy."

[23] The availability of treble damages does not dictate a different conclusion. This Court stated in *Cook County, Illinois v. United States ex. rel. Chandler*, 123 S. Ct. 1239, 1246 (2003), "it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives." As discussed previously, treble damages are available under the Lanham Act.

of the antitrust laws will result in greater cost to the consumer because of the litigation spawned. The same could be said for applying the antitrust laws to UPS and Federal Express. Ultimately, those entities may pass on the costs of litigation to consumers as well. But Congress has determined that any such costs are acceptable because, in the long run, deterrence of anticompetitive behavior will **lower** prices for consumers and enhance choice. As this Court has stated, "The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain . . . are favorably affected by the opportunity to select among alternative offers." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978). Any hostility to the antitrust laws should be directed to Congress, not this Court.[24]

Indeed, although the USPS predicts dire consequences from facing antitrust suits for its proprietary acts unconnected to Congress's command, Congress has determined that foreign governmental entities should be subject to suit under similar circumstances and, indeed, even when their commercial acts stem from a foreign government's legislative command. Under Section 1605(a)(2) of the Foreign Sovereign Immunities Act

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[24] Petitioner also suggests (Br. at 29-32) that any anticompetive acts can be rooted out in a procurement action. Petitioner's assertion suffers from two fundamental defects. First, many anticompetitive acts arise outside the procurement context and thus a procurement challenge could not remedy any such violations. Second, the procurement laws are aimed at preventing violations of procurement regulations – such as those that were at stake in the two cases cited by petitioner (Br. at 32) that were ultimately settled. They do not restrain all anticompetitive acts arising out of procurements, and Congress's very determination that the Postal Service need not follow the FAR reinforces the narrowness of any procurement remedy.

(FSIA) of 1976, injured parties can sue foreign governmental entities if they can demonstrate that the entity's conduct "is based upon a commercial activity carried in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a foreign state elsewhere and that act causes a direct effect in the United States." Congress defined "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Courts must therefore distinguish between commercial and sovereign acts in applying the FSIA.

For instance, in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the question presented was whether Argentina's default on bonds was an act taken "in connection with a commercial activity" and thus subject to suit in the United States. This Court agreed with the United States as *amicus* that issuance of the bonds constituted a commercial activity, and that because the rescheduling had a direct effect in the United States, Argentina could be sued. *Id.* at 619-20.

Under the FSIA, foreign postal services unquestionably can be sued for "commercial activities" in this country. Private firms presumably could sue the British Post Office, for instance, if it attempted to monopolize the express mail or calling card industry, but not for those acts closely related to a sovereign function.[25] Congress has determined that foreign governmental

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[25] Moreover, other nations subject their own governmental or quasi-governmental entities operating postal services to antitrust standards. *See United States Postal Service Reform: The International Experience:*

entities should only be protected in the exercise of their sovereign activities – as a policy matter, it deemed no further immunity necessary or appropriate.

Petitioner nevertheless suggests that subjecting the Postal Service in this country to antitrust liability would violate public policy, despite Congress's determination to permit suit against comparable foreign governmental entities. Its assertion in this case flies in the face of prior expressions of policy by members of the administration. The Department of Justice has recognized that the antitrust laws as currently constituted likely cover the USPS, and even the USPS has previously gone on record as supporting liability.

For instance, a 1977 presidential task force headed by Assistant Attorney General Thomas Kauper, Chief of the DOJ Antitrust Division, concluded – much as did the court below – that governmental enterprises acting in a commercial or proprietary capacity **should** be subject to the antitrust laws. The task force stated that "If the activity is 'political,' it should be exempt without regard to corporate form. However, if the activity is 'commercial,' the enterprise ought to be subject to ordinary commercial rules, including the antitrust laws." Further, it stressed that "[t]he mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws." Rather, "the commercial

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Hearing Before the Subcomm. on the Post Office and Civil Service of the Senate Comm. on Governmental Affairs, 104th Cong., 2d Sess. 183, 201, 227, 232, 242 (1996) (describing antitrust standards governing postal authorities in Australia, Canada, Denmark, France, Germany, New Zealand, and Sweden). Indeed, the Postal Service is subject to the antitrust laws of foreign nations. *See H.R. 3737, The Postal Reform Act of 1996: Hearings Before the Subcomm. on the Postal Serv. Of the House Comm. On Government Reform*, 104th Cong., 1st Sess. 879 (1996).

activities of a state-owned enterprise [should be held] to the same standards requiring (sic) of all who engage in commercial transactions in the market." *Antitrust Exemptions and Immunities, Hearing Before the Subcomm. On Monopolies and Commercial Law of the House Comm. On the Judiciary*, 95th Cong., 1st Sess 1890-91 (March 29, 1977).[26]

With respect to the USPS in particular, the Task Force suggested that antitrust immunity should attach as long as Congress "legislatively protected the enterprise from competition." *Id.* at 1891. Thus, no antitrust liability should exist for conduct arising from congressional direction. To the task force, the key question was whether "the enterprise is commanded by the state to undertake certain activity," a test borrowed from the *Parker v. Brown* context. *Id.* at 1889-90. This presidential Task Force therefore concluded that the nation would benefit from application of the antitrust laws to government enterprises such as the USPS. Although the Task Force's analysis sheds no light on the statutory interpretation question, as a policy matter it undercuts petitioner's assumption that this antitrust suit would not serve the public interest.

In the aftermath of the report, the Department of Justice publicly asserted that "while the point is by no means unarguable, neither the case law nor sound public policy would indicate that the Postal Service enjoys any comprehensive 'sovereign immunity' from the antitrust laws." The DOJ filed this document in response to a request for legal memoranda by the Postal Rate Commission on whether the USPS was subject to the antitrust laws. The DOJ stressed that, apart from the USPS's statutory monopoly, there is no reason why "even a lawful monopolist" should be exempt from "antitrust constraints when it seeks to extend or exploits its monopoly in

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[26] This Court cited the study with evident approval in *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983).

a manner not contemplated by its authorization." *Comments of the U.S. Department of Justice* (Dec. 6, 1978), Docket No. MC78-3, at 34 (Postal Rate Comm'n).

Moreover, the Department of Justice supported a legislative proposal to clarify the USPS's amenability to the antitrust laws in 1999. *H.R. 22, The Postal Modernization Act of 1999: Hearings Before the Subcomm. On the Postal Serv. of the House Comm. On Government Reform*, 106th Cong., 1st Sess. 332-33 (1999). The Deputy Assistant Attorney General of the Antitrust Division addressed the benefits of permitting antitrust suits against the Postal Service: "The direct goal of an antitrust enforcement action is to stop anticompetitive agreements and monopolistic conduct that interfere with the healthy competitive functioning of the marketplace. Consumers benefit when market dynamics reflect a competitive situation . . . [A]ntitrust enforcement provides a highly effective deterrent against unreasonable restraints of trade without resort to a more intrusive regime of government oversight, thus benefitting postal consumers, and the general public alike." *Id.* at 332. Moreover, in response to the USPS's fear of a flood of lawsuits, the DOJ official stated that "This is a concern of all firms to which the antitrust laws apply. It bears full consideration only if there is a demonstrable policy justification for shielding the USPS non-monopoly activities from antitrust scrutiny. As a general rule, we disfavor exemptions or protections that set one class of competitors apart from others under the law." *Id.* at 332-33.

Indeed, the USPS echoed the policy views of the Department of Justice in supporting a legislative proposal in 2002 that would have made clear its exposure to antitrust liability. *See* Postal Service Board of Governors Announces Support for Postal Reform Legislation, Press Release, 02-048 (June 4,

2002), http://ribbs.usps.gov.[27] The proposed legislation provided that the USPS "shall be considered a person" for purposes of "the antitrust laws" when it "engages in conduct with respect to any product which is not reserved to the United States under section 1696 of title 18."

Petitioner's protestations to the contrary, government officials have themselves advocated and/or anticipated that the USPS be subject to antitrust laws. Thus, although one might think from reading petitioner's brief that imposing antitrust liability on the USPS is unimaginable, administration officials ever since the passage of the PRA not only have imagined it, they have supported liability in order to protect the public.

In short, the court of appeals below persuasively concluded that Congress intended that the USPS be amenable to suit under the federal antitrust laws for its commercial acts, just like its competitors here and abroad. Congress's expansive definition of "person" under the antitrust laws, Congress's broad waiver of the USPS's immunity under the PRA, and Congress's underlying pro-competitive policy all demonstrate that Congress intended the USPS's commercial activities to be subject to antitrust scrutiny.

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[27] As one participant noted when supporting an earlier version of the bill, although "there is compelling legal precedent to support the proposition that the Postal Service is already subject to the antitrust laws," the bill would bridge 'the chasm between the legal reality, on the one hand, and the perception, myth and conduct of the Postal Service on the other." *H.R. 3737, The Postal Reform Act of 1996: Hearings Before the Subcomm. On the Postal Serv. Of the House Comm. On Government Reform*, 104th Cong. 1st Sess. 912 (1996) (statement of the Air Courier Conference of America).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted.

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STATUTORY APPENDIX

THE FEDERAL ANTITRUST LAWS: Relevant Provisions

15 U.S.C. § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 7. The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. § 9. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of section 8 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

15 U.S.C. § 12. The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. § 13(a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where

either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them[.]

15 U.S.C. § 15(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

THE POSTAL REORGANIZATION ACT

29 U.S.C. § 201. There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.

29 U.S.C. § 202(a). The exercise of the power of the Postal Service shall be directed by a Board of Governors composed of 11 members appointed in accordance with this section. Nine of the members, to be known as Governors, shall be appointed by the President, by and with the advice and consent of the Senate, not more than 5 of whom may be adherents of the same political party. The Governors shall elect a Chairman from among the members of the Board. The Governors shall be chosen to represent the public interest generally, and shall not be representatives of specific interests using the Postal Service, and may be removed only for cause. Each Governor shall

receive a salary of $30,000 a year plus $300 a day for not more than 42 days of meetings each year and shall be reimbursed for travel and reasonable expenses incurred in attending meetings of the Board. Nothing in the preceding sentence shall be construed to limit the number of days of meetings each year to 42 days.

(b) The terms of the 9 Governors shall be 9 years, except that the terms of the 9 Governors first taking office shall expire as designated by the President at the time of appointment, 1 at the end of 1 year, 1 at the end of 2 years, 1 at the end of 3 years, 1 at the end of 4 years, 1 at the end of 5 years, 1 at the end of 6 years, 1 at the end of 7 years, 1 at the end of 8 years, and 1 at the end of 9 years, following the appointment of the first of them. Any Governor appointed to fill a vacancy before the expiration of the term for which his predecessor was appointed shall serve for the remainder of such term. A Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year.

(c) The Governors shall appoint and shall have the power to remove the Postmaster General, who shall be a voting member of the Board. His pay and term of service shall be fixed by the Governors.

(d) The Governors and the Postmaster General shall appoint and shall have the power to remove the Deputy Postmaster General, who shall be a voting member of the Board. His term of service shall be fixed by the Governors and the Postmaster General and his pay by the Governors.

39 U.S.C. § 203. The chief executive officer of the Postal Service is the Postmaster General appointed under section 202(c) of this title. The alternate chief executive officer of the

Postal Service is the Deputy Postmaster General appointed under section 202(d) of this title.

39 U.S.C. § 401. The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name;

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

(3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures;

(4) to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents, except as otherwise provided in this title;

(5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor;

(6) to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it, including, without limitation, any property or interest therein transferred to it under section 2002 of this title;

(7) to accept gifts or donations of services or property, real or personal, as it deems, necessary or convenient in the transaction of its business;

(8) to settle and compromise claims by or against it;

(9) to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes; and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates; and

(10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

39 U.S.C. § 409

(a) Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28.

(b) Unless otherwise provided in this title, the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties, and the rules of procedure adopted under title 28 for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

(c) The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising

out of activities of the Postal Service.

39 U.S.C. § 410

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) section 552 (public information), section 552a (records about individuals), section 552b (open meetings), section 3102 (employment of personal assistants for blind, deaf, or otherwise handicapped employees), section 3110 (restrictions on employment of relatives), section 3333 and chapters 72 (antidiscrimination; right to petition Congress) and 73 (suitability, security, and conduct of employees), and section 5520 (withholding city income or employment taxes), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or section shall apply to the Postal Service unless expressly made applicable;

(2) all provisions of title 18 dealing with the Postal Service, the mails, and officers or employees of the Government of the United States;

(3) section 107 of title 20 (known as the Randolph-Sheppard Act, relating to vending machines operated by the

blind);

(4) the following provisions of title 40:

(A) sections 3114-3116, 3118, 3131, 3133, and 3141-3147; and

(B) chapters 37 and 173;

(5) the following provisions of title 41:

(A) sections 35-45 (known as the Walsh-Healey Act, relating to wages and hours); and

(B) chapter 6 (the Service Contract Act of 1965);

(6) sections 2000d, 2000d-1–2000d-4 of title 42 (title VI, the Civil Rights Act of 1964);

(7) section 19 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 668);

(8) the provisions of the Act of August 12, 1968 (42 U.S.C. 4151-4156);

(9) chapter 39 of title 31;

(10) the Inspector General Act of 1978; and

(11) section 5520a of title 5.

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No. 02-1290

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
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In the Supreme Court of the United States

No. 02-1290

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents concede both that Congress did not intend to create a cause of action under the antitrust laws against the United States, Resp. Br. 8-9, and that the Postal Service "must be viewed as part of the federal government," *id.* at 17. Those two principles compel the conclusion that respondents lack a cause of action against the Postal Service under the antitrust laws. Congress's creation of the Postal Service as part of the Executive Branch carries forward this Nation's long history of treating postal service as a "sovereign function" and "sovereign necessity," *United States Postal Serv.* v. *Council of Greenburg Civic Ass'ns*, 453 U.S. 114, 121 (1981), and of providing for those services to be performed by the United States Government. See 39 U.S.C. 101(a) (Postal Service shall be operated as "a basic and fundamental service" that is "provided to the people by the Government of the United States"). Not surprisingly, aside from the decision below, no court has held that the Postal Service (or,

for that matter, any other component of the federal government) is subject to the antitrust laws.

In support of the Ninth Circuit's decision, respondents argue that constituent parts of the United States Government may be amenable to suit under the antitrust laws, even though the United States is not. They also argue that the Postal Service is sufficiently distinct from the United States to render it a "person" under the antitrust laws. Finally, they argue that the Postal Service's competitive services should be subject to antitrust liability. Each of those contentions is fundamentally flawed.

A. The Term "Person" Under The Antitrust Laws Does Not Include Agencies And Instrumentalities Of The United States

1. Respondents argue that this Court's holding in *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), that Congress did not intend the term "person" to include the United States is "narrowly" limited to "the United States itself" "as sovereign." Resp. Br. 8, 9, 12. Respondents reason that, because only the United States may sue as plaintiff to enforce the antitrust laws, see 15 U.S.C. 15a, and because, in their view, agencies, instrumentalities, and other components of the United States Government should be able to sue in their own name for injuries to their business or property, those federal entities must fall within the term "persons" that may sue as plaintiffs or be sued as defendants under the antitrust laws. Resp. Br. 9, 15-16. Respondents' contention fails on several levels.

Acceptance of respondents' contention that an agency, instrumentality, or other entity of the United States Government may be a "person" would create an antitrust cause of action against all federal agencies and instrumentalities simply by virtue of a sue-and-be-sued clause. That result would be contrary to *FDIC* v. *Meyer*, 510 U.S. 471, 483-484

(1994), which held that the waiver of sovereign immunity in a sue-and-be-sued clause is not sufficient to create substantive liability and a cause of action against a federal agency. See U.S. Br. 17-19. Respondents' logic would also create an antitrust cause of action against all federal *officials* who are authorized to be sued in carrying out specified public functions. *E.g.*, 12 U.S.C. 1702, 42 U.S.C. 1404a (authorizing Secretary of Housing and Urban Development to sue and be sued); 19 U.S.C. 1920, 2350 and 42 U.S.C. 3211 (same for Secretary of Commerce); 20 U.S.C. 1066d, 1082 (same for Secretary of Education); 42 U.S.C. 292j (same for Secretary of Health and Human Services).

Moreover, the assertion that Congress intended to subject federal entities to the antitrust laws cannot be reconciled with this Court's conclusion in *Cooper*, 312 U.S. at 607, that Congress "obvious[ly]" did not intend to embrace the United States within the term "person" that may sue as an antitrust plaintiff or is subject to antitrust suit as a defendant. The United States asserts its sovereign authority through many formally distinct federal entities. Given that practical reality, this Court's precedents have uniformly treated a legislative intent to exclude the sovereign from the term "person" as equally excluding the agencies and instrumentalities through which the sovereign acts. U.S. Br. 8-9.[1]

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[1] Respondents and Amicus American Trucking Association (ATA) (Br. 14) err in assuming that injuries to the Postal Service and other federal entities cannot be vindicated under 15 U.S.C. 15a, which permits "the United States" to bring suits for treble damages for injury to "its business or property." Section 15a permits the United States to recover for its injuries when it acts (through any of its constituent parts) as a purchaser in the marketplace. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341-342 (1979); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263-264 (1972). Such injuries are necessarily sustained when federal entities purchase goods. See also H.R. Rep. No. 422, 84th Cong., 1st Sess. 1-5 (1955) (setting forth congressional intent to change the result reached in *Cooper* to authorize the United States to recover damages for collusive prices paid in government procurement). In an analogous context, this Court has held that federal entities are part of the United States Government for purposes of the False Claims Act, and that the United States therefore may sue to recover for false claims submitted to such entities. *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958) (Commodity Credit Corporation); *United States* v. *McNinch*, 356 U.S. 595, 598 (1958) (Federal Housing Administration). Antitrust injury, like loss from fraud, that is sustained by the Postal Service is paid by the public fisc. 39 U.S.C. 2001, 2003, 2008(c), 2401(a); see also 39 U.S.C. 409(d) (providing for representation of Postal Service by Department of Justice).

Respondents offer no basis for a different treatment with respect to the meaning of the term "person" under the federal antitrust laws. In passing those laws, Congress did not intend to regulate entities that Congress itself created under federal law as constituent parts of the United States Government. Thus, every lower court to consider the issue has held there is no substantive cause of action under the antitrust laws against agencies and instrumentalities of the United States. U.S. Br. 9-10.[2] Indeed, respondents have not cited a single decision since the passage of the Sherman Act in 1890 that holds that a federal agency, instrumentality, or comparable entity may be subject to antitrust liability. In the face of that consistent treatment of federal entities over the last century, Congress has declined to amend the antitrust laws to create a cause of action against the United States or any of its constituent parts.[3]

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[2] Amicus ATA suggests (Br. 6 n.2), without citation to authority, that an exclusion of a federal entity from the term "person" would not insulate the entity from liability under Section 1 of the Sherman Act, 15 U.S.C. 1, which does not in terms limit its scope to "persons." The logic of that contention, however, would create a substantive cause of action against the United States, contrary to the Court's decision in *Cooper*.

[3] Before the District of Columbia Circuit held in *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 247 (1981), cert. denied, 455 U.S. 919 (1982), that federal instrumentalities are not subject to suit under the antitrust

2. Invoking a "presumption against implicit exemptions" from the antitrust laws (*e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787 (1975)), respondents also attempt to draw support from decisions holding that the term "person" includes other public entities, such as States, foreign governments, municipalities, and public railroads. Resp. Br. 9-12. Those decisions, however, do not cast doubt on Congress's specific intent to exclude the *United States Government* from the term "person." To the contrary, this Court's precedents recognize that Congress's application of the antitrust laws has varied according to the sovereign at issue.

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laws, a district court had held that the Tennessee Valley Authority (TVA) is a person that may sue as an antitrust *plaintiff* because Congress created the TVA as a government "corporation." *United States* v. *General Elec. Co.*, 209 F. Supp. 197, 203 (E.D. Pa. 1962); see *In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223, 1227-1228 (J.P.M.L. 1978) (citing *General Elec. Co.* in holding that antitrust action brought by TVA was subject to transfer under 28 U.S.C. 1407). A subsequent district court, however, had accepted the contention of the TVA that, as a federal agency or instrumentality, it is *not* a person amenable to suit as an antitrust defendant. *Webster County Coal Corp.* v. *TVA*, 476 F. Supp. 529, 531-532 (W.D. Ky. 1979).

In 1978, the Department of Justice's Antitrust Division filed comments with the Postal Rate Commission concerning the implications for competition of the Postal Service's proposal to offer certain electronic mail transmission. In those comments, the Division suggested that some of the operations of the Postal Service might be found to be subject to the antitrust laws. Comments of the U.S. Dep't of Justice, *In re Electronic Mail Proposal, 1978* 20-35 (Postal Rate Comm'n Dec. 6, 1978) (No. MC78-3). Those comments did not discuss this Court's decision in *Cooper* and were made before the D.C. Circuit's decision in *Sea-Land* and other appellate decisions holding that agencies and instrumentalities of the United States are not subject to the antitrust laws. See U.S. Br. 9-10. To the extent that those comments expressed a view of the Department of Justice at the time that the Postal Service was subject to the antitrust laws, they no longer represent the position of the Department of Justice or the United States.

Thus, the Court has reaffirmed its holding in *Cooper* that the term "person" does not include the United States while at the same time holding that the term does include foreign governments, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 316-318 (1978), and the States, *Georgia* v. *Evans*, 316 U.S. 159, 161-162 (1942). Cf. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978) (holding that Congress did not intend municipalities to share in antitrust exemption applicable to "State[] acts of government").

For similar reasons, respondents and their amici mistakenly rely on precedents addressing whether government corporations should be treated as the United States under certain statutes. Resp. Br. 13-15; ATA Am. Br. 9-12. In particular, respondents are wrong in asserting that the Postal Service is essentially a "corporation," governed by "a corporate charter," and run by a "corporate chief executive." Br. 22. Quite to the contrary, Congress specifically rejected proposals to create the Postal Service as a government corporation with a corporate charter and equity ownership interests. U.S. Br. 26. Against the backdrop of this Court's decision in *Cooper* holding the United States not to be a "person" under the antitrust laws, Congress created the Postal Service as part of the "Government of the United States," 39 U.S.C. 201, to be comprised of federal officers and employees who would carry forward this Nation's unbroken tradition of providing postal services as uniquely sovereign functions, regardless of profit. U.S. Br. 13-16.[4]

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[4] See also 116 Cong. Rec. 19,847 (1970) (Rep. Henderson) ("[L]et me make it clear that in this bill * * * no postal corporation is formed. There is no new legal entity outside of the executive branch covering the employees, and the postal authority would retain civil service status like all other Federal employees."); *id.* at 19,854-19,855 (Rep. Button) ("I am proud that I stood firm, Mr. Chairman, against those who would have caused us to capitulate to the numerous undesirable aspects of the postal corporation."); *id.* at 22,053 (Sen. Fannin) ("[T]he Postal Service—even

The decisions cited by respondents and amici ATA *et al.* are inapposite, for none provides a basis for finding a congressional intent to create a cause of action against the United States Government or one of its constituent parts. Thus, *Pierce* v. *United States*, 314 U.S. 306 (1941), and *United States* v. *Strang*, 254 U.S. 491 (1921), addressed the question whether an employee of a government corporation or a corporation in which the United States was a stockholder was falsely acting as a government agent or officer within the meaning of a criminal prohibition. Furthermore, *Strang* and *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922), addressed under various statutes the status of the United States Shipping Board Emergency Fleet Corporation, which was "chartered under local laws and organized so that private parties could share stock ownership with the United States." *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958). Finally, *Arkansas* v. *Farm Credit Services*, 520 U.S. 821 (1997), held that Production Credit Associations (PCAs), whose entire stock "is owned by private entities," may not share in the judicially-created exception from the Tax Injunction Act, 28 U.S.C. 1341, for suits by the United States on behalf of its instrumentalities, because those corporations "do not have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States." 520 U.S. at 831-832.

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after reorganization—is not going to be like the telephone company. * * * Its directors will * * * represent the public generally and will not be operating a business for profit."); *Hearings on H.R. 17070 and Similar Bills, Bills To Improve and Modernize the Postal Service, to Reorganize the Post Office Department, and for Other Purposes, Before the House Committee on Post Office & Civil Service*, 91st Cong. 2d Sess., Serial No. 91-22, 2 (1970) (Rep. Dulski) ("I am particularly pleased with the plan to keep the postal service as an agency of the Government, rather that convert it into a public corporation.").

Those decisions involved neither the antitrust laws, the meaning of the word "person" amenable to suit, nor the status of the Postal Service. They accordingly furnish no basis for an antitrust cause of action against the Postal Service.

B. The Postal Service Is Part Of The United States Government And Therefore Not Subject To Suit Under The Antitrust Laws

1. Respondents do not dispute that the Cabinet-level Post Office Department as it existed from 1872 until 1970 was not a "person" subject to the antitrust laws under this Court's decision in *Cooper* or that its successor, the Postal Service, was likewise established as part of the United States Government. It follows that the Postal Service too is not such a "person," for respondents fail to point to *any* expression (much less a clear expression) of congressional intent in the Postal Reorganization Act (PRA) to render the Postal Service subject to the antitrust laws *notwithstanding* its status as a component of the United States Government. U.S. Br. 11-13; see *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991) ("Up until its reorganization in 1970, the Post Office Department was in fact a Cabinet-level department. * * * The PRA did not * * * fundamentally change the nature and purpose of the Postal Service.").

Respondents seize on four aspects of the PRA that, in their view, render the Postal Service liable under the antitrust laws: (a) its creation as an "independent establishment" (39 U.S.C. 201); (b) its authority to engage in non-postal and competitive operations (39 U.S.C. 404(a)(6)); (c) the exemption of the Postal Service from certain laws applicable to other government agencies (39 U.S.C. 410); and (d) the sue-and-be-sued clause (39 U.S.C. 401(1)). None of those statutory features, however, alters the fundamental

fact that the Postal Service is part of the United States Government, as confirmed by numerous explicit provisions in the PRA that designate and treat the Postal Service as a federal sovereign entity. U.S. Br. 13-16. Nor do those features remotely indicate a congressional intent to impose antitrust liability on the Postal Service.

a. Respondents and their amici place heavy reliance on the Postal Service's status as an "*independent* establishment." 39 U.S.C. 201 (emphasis added). See Resp. Br. 18-21. That argument, however, confuses a federal establishment's independence from partisan controls with a congressional intent to render the establishment a private entity. Section 201 by its express terms designates the Postal Service as an "independent establishment *of the executive branch of the Government of the United States.*" 39 U.S.C. 201 (emphasis added). Congress in the PRA likewise made explicit its intent that postal services would be provided "by the *Government of the United States.*" 39 U.S.C. 101(a) (emphasis added). The holding in *Cooper* that the antitrust laws do not apply to the United States Government is therefore controlling here. By contrast, where Congress has intended an entity that it creates *not* to be part of the United States Government for purposes of imposing statutory liability, it has done so in unmistakable terms by providing that an entity is not an agency or establishment of the United States. U.S. Br. 16, 21 & n.7.

Congress did not confer independence on the Postal Service in order to render it a private entity. Rather, Congress wanted to free the Service from the congressional micro-management and partisan influences that had historically impinged on the Service's ability to perform its sovereign functions in a sound manner. U.S. Br. 12-13, 25-26. Thus, when the Postal Service was created, President Nixon explained that it would be an entity like "such presently existing independent establishments as the Board of Gov-

ernors of the Federal Reserve System, the Securities and Exchange Commission, and the National Aeronautics and Space Administration," H.R. Doc. No. 313, 91st Cong., 2d Sess. 2 (1970), none of which is subject to the antitrust laws. See also 116 Cong. Rec. 19,845 (1970) (Rep. Dulski) ("The Post Office Department is replaced by a non-Cabinet independent Government agency—the U.S. Postal Service.").

It is also irrelevant that, as respondents observe (Br. 20), Congress gave the Postal Service the power to enter into contracts, 39 U.S.C. 401(3), to keep its own accounting records, 39 U.S.C. 401(4), and to operate and maintain property, 39 U.S.C. 401(6). Congress has granted similar powers to other paradigmatically federal agencies, such as the Department of Education. 20 U.S.C. 3475 (contracts), 3477 (acquisition and maintenance of property); see also 5 U.S.C. 301 ("The head of an Executive department * * * may prescribe regulations for * * * the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.").

Respondents further err in relying on Congress's designation of the Postal Service as an "establishment" (39 U.S.C. 201) of the United States, rather than as an "agency" or "instrumentality" of the United States. Resp. Br. 18. Congress created many quintessentially federal entities as "establishments." *E.g.*, 5 U.S.C. 1101 (Office of Personnel Management); 42 U.S.C. 2286 (Defense Nuclear Facilities Safety Board); 49 U.S.C. 1111 (National Transportation Safety Board); 39 U.S.C. 3601 (Postal Rate Commission); 49 U.S.C. 10301 (1994) (repealed 1995) (Interstate Commerce Commission).[5] For similar reasons, respondents mistakenly rely (Br.

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[5] Pursuant to 5 U.S.C. 903 and 906, Executive Orders have designated other federal entities as independent establishments. *E.g.*, Reorg. Plan No. 3 of 1978, 3 C.F.R. 329 (1979), *reprinted in* 5 U.S.C. App. at 212 (Federal Emergency Management Agency); Reorg. Plan No. 2 of 1978,

19 n.8) on the exclusion of the Postal Service from the definition of executive departments and agencies for purposes of Title 5 of the United States Code. "The mere fact that the Postal Service is not designated a department * * * does not mean it is not a part of the executive branch. * * * Congress could not have made its intent more clear [in 39 U.S.C. 101(a) and 201] that the Postal Service was to remain a part of the U.S. Government and to perform executive branch functions within that government." *Silver*, 951 F.2d at 1035.[6]

b. Respondents also rely on the fact that the Postal Service, pursuant to its authority under 39 U.S.C. 404(a)(6), engages in "nonpostal or similar services," such as selling greeting cards and on-line billing services. Resp. Br. 22-24, 33-34. A federal entity's commercial endeavors, however, do not change the fact that the entity is performing a sovereign function. This Court's "decisions have made it clear that the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed." *Federal Land Bank* v. *Board of County Commn'rs*, 368 U.S. 146, 150-151 (1961); see also *Federal Land Bank* v. *Bismarck Lumber Co.*, 314

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§ 301, 3 C.F.R. 327 (1979), *reprinted in* 5 U.S.C. App. at 208 (1978) (Federal Labor Relations Authority).

[6] Amicus Center for the Advancement of Capitalism argues (Br. 5-8) that the Postal Service is unconstitutionally structured because the appointment of the Postmaster General by the nine Presidentially-appointed Governors (39 U.S.C. 202(a) and (c)) violates the Appointments Clause, U.S. Const. Art II, § 2, Cl. 2, because the Postmaster General, in amicus's view, is a superior officer who must be appointed by the President. The only court to consider that contention, however, has specifically rejected it on the ground that the Governors are the heads of the Postal Service in whom Congress has vested authority to appoint and remove inferior officers such as the Postmaster General. *Silver*, 951 F.2d at 1038-1040.

U.S. 95, 102 (1941) ("The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.").

That principle fully applies to the Postal Service. For well over a century, postal operations have "compete[d] with private businesses." *Emergency Fleet Corp., U.S. Shipping Bd.* v. *Western Union Tel. Co.*, 275 U.S. 415, 425 (1928). "The post office has since 1872 competed with bankers through money orders; since 1910 with savings banks by receiving deposits on interest; since 1913 with express companies through the parcel post." *Ibid.* The PRA, in Section 404(a)(6), simply gives the Postal Service the discretion to carry forward that tradition. In short, the fact that the Postal Service may "operat[e] alongside private companies" is not a basis for judicially inferring that Congress intended to create antitrust liability against the federal government. *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 247 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982).

c. Respondents also rely (Br. 24-26) on 39 U.S.C. 410(a), which provides that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds * * * shall apply to the exercise of the powers of the Postal Service," except as otherwise provided in Section 410(b). That provision too, however, does not alter the status of the Postal Service as part of the United States Government. To the contrary, the very fact that Congress passed Section 410 to exempt the Postal Service from certain laws that otherwise apply to federal agencies confirms Congress's intent to create the Postal Service as an arm of the United States.

Section 410 furthers Congress's intent to permit the Postal Service to operate more efficiently by rendering inapplicable laws and regulations that apply to other government agencies, such as the Administrative Procedure Act (APA)

and the Federal Acquisition Regulations (FAR). See also 116 Cong. Rec. 27,607 (1970) (Rep. Udall) ("[W]e wanted to make sure that regulations—other than those adopted by the Postal Service itself—would not apply to the Postal Service by inadvertence."); *Butz Eng'g Corp.* v. *United States*, 499 F.2d 619, 626 (Ct. Cl. 1974). Congress elsewhere has exempted certain federal agencies from government-wide rules. *E.g.*, 31 U.S.C. 5136 (exempting Mint operations within the Department of Treasury from procurement and public contracts laws); 49 U.S.C. 40110(d)(2) (exempting the Federal Aviation Administration from certain federal acquisition laws, including the FAR). It would be quite ironic if a provision that excepts the Postal Service from liability under federal laws unless *expressly* provided by Congress could be a basis for judicially *inferring* a cause of action against the Postal Service that would impose new liability on the government and intrusion into the Postal Service's operations.

d. Respondents also reiterate (Br. 26-34) the Ninth Circuit's reliance on the sue-and-be-sued clause in 39 U.S.C. 401(1) and argue that a waiver of sovereign immunity renders the federal entity subject to a "generally applicable cause of action." Resp. Br. 32. As respondents elsewhere recognize, however, "[i]f there is no applicable cause of action, as in *Meyer*, then no liability should lie." *Id.* at 33. There is no antitrust cause of action against federal entities such as the Postal Service. Indeed, the sue-and-be-sued clause confirms the federally sovereign status of the Postal Service and cannot be a basis for subjecting it to a cause of action that is inapplicable to the federal sovereign. U.S. Br. 17-22.

For similar reasons, respondents err in relying on *Loeffler* v. *Frank*, 486 U.S. 549 (1988), and *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512 (1984). Those decisions concern the scope of the waiver of sovereign immu-

nity in instances where a cause of action otherwise exists against the Postal Service. U.S. Br. 22-24. The same is true with respect to other decisions cited by respondents and their amici. Resp. Br. 13-15; Washington Legal Foundation Am. Br. 9, 15, 17. Thus, in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 388-394 (1939), the Court held that Congress had waived sovereign immunity for a government corporation, the Reconstruction Finance Corporation (RFC), and, in *Reconstruction Finance Corp.* v. *J.G. Menihan Corp.*, 312 U.S. 81, 83 (1941), the Court construed the RFC's sue-and-be-sued clause to render the corporation subject to the "ordinary incident of unsuccessful litigation in being liable for the costs which might properly be awarded against a private party in a similar case." Similarly, *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904, 908 (1824), held that an incorporated bank of which the State was one member was not entitled to the State's sovereign immunity under the Eleventh Amendment, because the State "acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation." None of those decisions holds or suggests that a waiver of sovereign immunity in a sue-and-be-sued clause in an Act of Congress can be a basis for independently creating a cause of action against a federal entity such as the Postal Service. And such a principle would conflict with this Court's subsequent decision in *FDIC* v. *Meyer*, 510 U.S. at 484.[7]

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[7] *Pennsylvania Department of Environmental Resources* v. *United States Postal Service*, 13 F.3d 62, 65 (3d Cir. 1993), relied upon by respondents (Br. 34 n.19), simply held that the Postal Service was liable for civil penalties under 33 U.S.C. 1323, which expressly makes certain state environmental laws applicable to "[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branch of the Federal Government."). Respondents also mistakenly rely (Br. 33 n.18) on the Federal Communication Commission's conclusion in *In re Graphnet Systems, Inc.*, 73 F.C.C.2d 283 (1979), vacated as moot *sub nom.*, *United States Postal*

2. Respondents also rely (Br. 20-21, 23, 29-30) on instances in which the Postal Service, in their view, is treated as if the Postal Service were not the United States. None of those distinct contexts, however, supports the conclusion that the Postal Service is subject to antitrust liability.

Respondents observe (Br. 21) that the Postal Service has sought copyright protection for works of its employees notwithstanding that 17 U.S.C. 105 provides that "[c]opyright protection is not available for any work of the United States Government." The Postal Service has not sought protections under the copyright laws, however, because it views itself as a non-United States entity. Rather, the Postal Service has relied upon Congress's specifically expressed intent that, "[i]n accordance with the objectives of the Postal Reorganization Act of 1970," 17 U.S.C. 105 would "not apply to works created by employees of the United States Postal Service," so that the Postal Service could "use the copyright law to prevent the reproduction of postage stamp designs for private or commercial non-postal services." H.R. Rep. No. 1476, 94th Cong., 2d. Sess. 60 (1976) (excerpted in 17 U.S.C. 105 note). Nothing concerning that interpretation of copyright law—for the protection of the Postal Service—contradicts Congress's insistence that the Postal Service remain a part of the United States Government or alters the established exemption of such federal entities from the antitrust laws.

Similarly inapposite are lower court decisions holding that the Postal Service's sue-and-be-sued clause rendered it a "person" under the Lanham Act. *Federal Express Corp.* v. *United States Postal Serv.*, 151 F.3d 536 (6th Cir. 1998);

Service v. *FCC*, No. 79-2243 (D.C. Cir. Oct. 14, 1980) (per curiam), that the Postal Service was a "person" subject to regulation under 47 U.S.C. 153(i) (1976). That vacated FCC decision was never subjected to judicial review.

Global Mail Ltd. v. *United States Postal Serv.*, 142 F.3d 208, 216-217 (4th Cir. 1998); *United States* v. *Q Int'l Courier, Inc.* 131 F.3d 770, 775 (8th Cir. 1997). Those cases construed an earlier version of the Lanham Act, 15 U.S.C. 1127, that had defined "person" to include an "organization capable of suing and being sued in a court of law." By contrast, the antitrust laws have never defined the term "person" by reference to whether an entity may sue or be sued. Thus, the United States is not a "person" under the antitrust laws even though "[t]he United States is a juristic person in the sense that it has capacity *to sue*." *Cooper*, 312 U.S. at 604 (emphasis added). The antitrust laws likewise exclude the United States and its agencies and instrumentalities from their coverage, even where such entities have the capacity *to be sued*.

Respondents also mistakenly rely (Br. 21) on the view expressed by a Postal Service official in 1971 that securities issued by the Postal Service were exempted securities under the Securities and Exchange Act because they were issued by a "person controlled or supervised by and acting as an instrumentality of the Government of the United States." 15 U.S.C. 77c(a)(2). The official simply argued that the Postal Service fell within the Act's definition of "person" that included "any unincorporated organization, or a *government* or political subdivision thereof," because, as a sovereign entity, the Postal Service "act[s] as an instrumentality of the Government of the United States." United States Postal Serv. (USPS No-Action Letter), 1971 WL 6571, *2 (Sept. 27, 1971) (quoting 15 U.S.C. 77b(a)(2) and 77c(a)(2)) (emphasis added). That view is fully consistent with the conclusion that the Postal Service is not a "person" under the

antitrust laws because the antitrust laws *exclude* the federal government and its agencies and instrumentalities.[8]

Equally unpersuasive is the heavy reliance by respondent and its amicus ATA on one district court decision, *United States* v. *American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978), which found that the Postal Service did not have to respond to a discovery request for the production of documents in an antitrust suit brought by the United States. Resp. Br. 20-21; ATA Am. Br. 3, 15, 24. That decision merely held that the discovery request did not extend to documents "in the possession of the Federal Communications Commission and other independent regulatory agencies," including the Federal Trade Commission, the Federal Power Commission, as well as the Postal Service, which the court found to be similarly independent of the Department of Justice and the President's control over executive agencies. 461 F. Supp. at 1335-1336 n.65. That decision does not remotely suggest that Congress intended to apply the antitrust laws to the Postal Service and other federal agencies that enjoy some measure of independence from Presidential control.

C. Respondents' Policy Arguments Are Without Merit

1. Respondents argue that the creation of an antitrust cause of action against the Postal Service would, under the

[8] Respondents observe (Br. 23) that the Postal Service in 1971 made an alternative argument to the SEC that, although the Service was not "technically" a corporation, its securities were exempt because they should be treated *as if* issued by a "corporation[] in which the United States has a direct or indirect interest." USPS No-Action Letter, *supra*, at *3 (quoting 15 U.S.C. 78c(a)(12) (1970)); see 36 Fed. Reg. 21,365 (1971) (designation of exempt securities by Department of Treasury). The SEC did not address that contention, but rather accepted the Postal Service's primary contention that the securities at issue would be exempt under 15 U.S.C. 77c(a)(2). USPS No-Action Letter, *supra*, at *4.

Ninth Circuit's "'conduct-based' immunity" doctrine (see Pet. App. 13a), impose liability on the Postal Service for only "acts unconnected to the legislative will that are anti-competitive." Resp. Br. 35. Respondents rely on the principle that a person is shielded from antitrust liability if the action "derive[s] its authority and its efficacy from the legislative command of the state." *Id.* at 36 (quoting *Parker* v. *Brown*, 317 U.S. 341, 350 (1943)).

A "conduct-based immunity" doctrine, however, is out of place for a *federal* entity like the Postal Service that Congress itself created as part of the Executive Branch to take all appropriate action in furtherance of its sovereign powers and functions. U.S. Br. 28-31. Unlike other governmental bodies and private entities, Congress did not intend to subject entities that Congress itself created as part of the federal government to any form of liability under the antitrust laws.

Respondents offer no coherent basis for determining which actions of the Postal Service fail to "carry[] out its legislative mandate" and therefore are "unconnected to the legislative will." Resp. Br. 35, 37. This suit proves the point. Respondents contend that the routine procurement of mail sacks at issue here is subject to antitrust scrutiny because "Congress has not determined that monopolistic procurement practices are vital to any congressional goal." Br. 35 n.21. As a federal agency, however, *all* actions of the Postal Service, including its procurement purchases, are presumptively connected to the command and direction of Congress. Indeed, nearly all governmental agencies engage in commercial procurements of some kind.

Also lacking in principle is respondents' argument that the antitrust laws should extend to all "commercial actions unconnected to the legislative monopoly." Resp. Br. 37. In terms of *specific congressional authorization*, there is no distinction whatsoever between the Postal Service's exclu-

sive or "monopoly" rights with respect to the delivery of letters, 39 U.S.C. 601-606 and 18 U.S.C. 1693-1699, and its congressionally-imposed obligation to provide universal *parcel* and *express* mail services, 39 U.S.C. 403 and 3623(d), notwithstanding the presence of competition in those services from private entities.

The same congressional authorization also covers the Postal Service's *nonpostal* activities. Far from being "unconnected to the legislative will," Congress conferred on the Postal Service the specific power "to provide, establish, change, or abolish special nonpostal or similar services" (39 U.S.C. 404(a)(6)), and Congress did so in the same section of Title 39 in which it conferred on the Postal Service the power to engage in postal services such as mail delivery and postal stamp sales, 39 U.S.C. 404(a)(1) and (4). Finally, it would make no sense to apply a conduct-based immunity doctrine based on whether Congress required the particular action at issue. Such a rule would conflict with Congress's specific intent in the PRA to eschew micro-management of the Postal Service's operations. U.S. Br. 30-31.

2. Respondents also argue (Br. 42) that the imposition of antitrust liability on the Postal Service would be consistent with the Postal Service's recent expression of support for a bill that would have made it a "person" subject to suit under the antitrust laws. See H.R. 4970, 107th Cong., 2d Sess. § 304 (2002). The support of the Postal Service, however, was directed at the bill as a whole, which would have radically restructured the Postal Service's operations, including giving the "organization pricing flexibility it desperately needs." United States Postal Serv., *Postal Service Board of Governors Announces Support for Postal Reform Legislation, Postal News Release No. 02-048* (June 4, 2002) <http:

//www.usps.com/news/2002/press/pr02_048.htm>. That bill, moreover, was never acted on by Congress.[9]

From the outset, the United States Government has engaged in postal operations free of any antitrust constraints. It is the role of Congress to make the fundamental policy decision whether now to change course and to impose a potentially enormous and unprecedented liability on the Postal Service by subjecting it to the antitrust laws.

* * * * *

For the foregoing reasons and those stated in our opening brief, the court of appeals' decision should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

OCTOBER 2003

[9] Congress likewise failed to pass a similar bill in 1999 that would have made the Postal Service a "person" under the antitrust laws. H.R. 22, 106th Cong., 1st Sess. § 307 (1999).

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IN THE

Supreme Court of the United States

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v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CENTER FOR THE ADVANCEMENT OF CAPITALISM AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The Center for the Advancement of Capitalism ("CAC") is a District of Columbia corporation organized in 1998, and exempt from income tax under § 501(c)(4) of the Internal Revenue Code. CAC's mission is to present analyses to policymakers, the judiciary, and the public to assist in the identification and protection of the individual rights of the American people. CAC applies Ayn Rand's philosophy of Objectivism to contemporary public policy issues, and provides empirical studies and theoretical commentaries on the impact of legal and regulatory institutions upon the rights of American citizens.

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[1] CAC files this brief with the consent of all parties. The letters granting consent have been filed with the Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than CAC or its counsel, make a monetary contribution to the preparation or submission of this brief.

CAC's primary mission is to advance philosophical and legal principles that promote limited government, individual rights, and capitalism. This case directly relates to CAC's mission, and accordingly, this Court's ultimate decision impacts the interests of CAC and its supporters. This case presents the question of whether a government-created monopoly may be sued under the antitrust laws[2] for commercial activities unrelated to that monopoly.

CAC files this brief in support of neither party. While we support affirming the judgment below, we do so for reasons unrelated to the respondents' underlying lawsuit, and on principle, we oppose settling commercial disputes through the use of the antitrust laws.

SUMMARY OF ARGUMENT

The Ninth Circuit held that the Postal Service (the "Service") is a "person"[3] under the antitrust laws because of the "sue-or-be-sued" language contained in 39 U.S.C. § 401(1). The Service argues this is erroneous because "sue-or-be-sued" constitutes only a waiver of sovereign immunity, and since it possessed immunity in the first place, it is a sovereign, not a person. Relying on *United States v. Cooper Corp.*[4], the Service claims that no entity which incorporates the United States' sovereign power can be sued under the antitrust laws.

The Postal Service's position is incorrect because the Service itself is not a properly constituted "sovereign" entity under the Constitution. Despite the definition of the Service as an "independent establishment of the executive branch,"[5] the Service's organization is wholly incompatible with the

[2] Throughout this brief, "antitrust laws" refer primarily to the Sherman Act, 15 U.S.C. § 1, *et seq.* and the Clayton Act, 15 U.S.C. § 12, *et seq.*
[3] "Person" for antitrust purposes is defined in 15 U.S.C. § 7.
[4] 312 U.S. 600 (1941).
[5] 39 U.S.C. § 201.

requirements of Article II for organization of sovereign agencies. Indeed, if the Service were sovereign, this Court would have to strike down portions of the Postal Reorganization Act[6] ("PRA") as unconstitutional under *Morrison v. Olson*[7] and its antecedents. Rather than take this step, the Court should recognize the Service's current structure as that of a non-sovereign government-sponsored corporation that has the same potential to be sued under the antitrust laws as any business corporation.

Moreover, the Postal Service is not entitled to sovereign status because of its substantial non-postal activities; activities that are irrelevant to the Service's constitutional objectives under the Post Office Clause. And despite the Service's argument that antitrust lawsuits would compromise its congressional mandates with respect to the mail, there is no valid public policy reason that warrants reversal of the Ninth Circuit's decision, nor is there reason to infer a broad antitrust exemption for the Service based on existing antitrust policy.

ARGUMENT

I. The Postal Service, as presently structured, does not carry out an essential sovereign function, and is not entitled to be treated as a sovereign entity under the Constitution.

Sovereignty, Chief Justice Jay once wrote, is in the people of the nation.[8] Unlike the feudal principles that underscore traditional European concepts of sovereignty, American sovereignty is rooted in the principles of individual rights and the equality of citizens before the law. The Constitution animates these principles by protecting the individual rights of every citizen through institutions that

[6] Publ. L. 91-375 (39 U.S.C. § 101, *et seq.*) (1970).
[7] 487 U.S. 654 (1988).
[8] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) (seriatim opinion of Jay, C.J.)

exercise the legislative, executive, and judicial powers. These powers constitute the body of *sovereign rights*, that is, the "unique right possessed by a state or its agencies that enables it to carry out its official functions for the public benefit."[9] These sovereign rights are simply an extension of individual rights, and not a set of powers vested in some higher being or a particular individual. These rights are also "distinguished from certain *proprietary rights* that [the state] may possess like any other private person" (italics added).[10] In this case, the Court must decide whether the Postal Service exercises sovereign or proprietary rights for antitrust enforcement purposes. CAC argues that the Service exercises proprietary rights only when it engages in commerce unrelated to its constitutional duty to provide mail services. Therefore, the Service is entitled to no sovereign classification that would exempt it from the antitrust laws.

a. The Postal Service's organizational structure is incompatible with the Constitution's requirements for a sovereign entity within the executive branch.

The Postal Reorganization Act defines the Postal Service as an "independent establishment of the executive branch." This is not a clear definition. The Service is neither an outright agency nor a traditional corporation. The question is, on which side does the Service fall when determining personhood under the antitrust laws? The Service argues that it is constructed to perform an "essential" sovereign function.[11] But the nature of the Service's organization and governing case law indicate just the opposite.

By its own reading of the PRA, the Postal Service performs an "executive" function.[12] It does not perform legislative or judicial functions, although the Service

[9] BLACK'S LAW DICTIONARY 1401 (7th ed. 1999)
[10] Id.
[11] Pet. 4.
[12] Pet. 4, 8.

possesses limited regulatory powers related to its mail monopoly.[13] Thus, for purposes of this case, the question is limited to whether the Service is an executive agency.

If the Postal Service is correct in stating that it is a "sovereign" entity under the executive branch, then the Service's current legal structure must be held unconstitutional. The problem arises under 39 U.S.C. § 202(c), which requires that the Postmaster General be appointed by the nine governors of the Postal Service. The governors, who are appointed by the President with the advice and consent of the Senate, have the exclusive power to hire and fire the Postmaster General at-will.[14] Although the Postmaster General is the chief executive officer of the Service and enjoys final authority over administrative matters[15], he is ultimately answerable only to the nine appointed governors.[16]

The constitutional problem is that the Postmaster General, as the head of an organization claiming to be a sovereign agency, should be appointed by the President with the advice and consent of the Senate. Under the Appointments Clause of Article II[17], only "inferior" officers of the United States may be hired outside the presidential-nomination-and-Senate-confirmation process. "Superior" officers—including all department heads—must be appointed by the President, and be ultimately be accountable to the President, who is the Nation's chief executive.[18]

[13] *See, e.g.*, 39 U.S.C. § 401(9) (granting the Service eminent domain powers), § 404(7) (authorizing the Service to investigate postal offenses).
[14] *See Carlin v. McKean*, 823 F.2d 620, 623 (D.C. Cir. 1987).
[15] *See, e.g.*, 39 U.S.C. § 203, 39 C.F.R. §§ 3.5, 211.3 & 221.3(b).
[16] *See Carlin*, 823 F.2d at 624.
[17] U.S. CONST. art. II, sec. 2, cl. 2.
[18] U.S. Const. art. II, sec. 1, cl. 1 ("the executive Power shall be vested in a President of the United States of America."); *See also* art. II, sec. 3 (the President "shall Commission all the Officers of the United States").

In the past, the Court held that the line dividing the classification of superior and inferior officers is "far from clear" by simply reading the Appointments Clause.[19] At the same time, the Court has established some basic, non-exclusive criteria for drawing this line. In *Morrison v. Olson*, the Court looked to three factors in determining whether an Independent Counsel appointed by a federal court and subject to dismissal by the Attorney General only "for cause" was a superior officer. The Court ultimately concluded that the Independent Counsel was in fact an inferior officer for three reasons: First, the officer was "subject to removal by a higher Executive Branch official"; second, the law provided only "certain limited duties" for the Independent Counsel, or put another way, the office did not "include any authority to formulate policy for the Government or the Executive Branch"; and finally, the office itself was "limited in jurisdiction."[20] The *Morrison* Court read these factors together in holding that the Independent Counsel was unmistakably an inferior officer under the Appointments Clause.[21]

In this case, the Postmaster General easily falls on the "superior" side of the line under all three of the *Morrison* tests. The Postmaster General's authority under the PRA is extensive, not limited in duties or jurisdiction like the Independent Counsel's. More importantly, the Postmaster General is not subject to removal by any higher Executive Branch official. Neither the President nor any officer under his direction may fire the Postmaster General. That power is vested solely and irreversibly in the nine governors.

It could be argued that the Postmaster General is an inferior officer because he is ultimately accountable to the governors. Under this interpretation, the governors are the "superior" officers within the Postal Service, not the

[19] *Morrison v. Olson*, 487 U.S. at 671.
[20] Id. at 671-673.
[21] Id. at 672.

Postmaster General. But this reasoning lacks credibility. First, the governors are not directly accountable to the President, since governors may be dismissed only "for cause,"[22] thus denying the President the ability to directly influence the hiring or firing of a Postmaster General. Second, the Board of Governors is composed of eleven members—the nine appointed governors, the Postmaster General, and the Deputy Postmaster General.[23] The latter two are discretionary appointments made by the nine governors, and although the Postmaster General cannot vote on matters related to his own hiring and firing, he is nonetheless a member of the body given ultimate power over the Service, thus rendering him a superior officer.

The only other exception to the superior officer requirements of the Appointments Clause is the rule first enunciated by the Court in *Humphrey's Executor v. United States*.[24] In that case, the court held that Congress was permitted to restrict the President's power to remove officers of quasi-legislative and quasi-judicial agencies, such as the Federal Trade Commission, since such agencies are not wholly executive in nature.[25] This exception is inapplicable to the Postal Service, its Board of Governors, and the Postmaster General, since the Service, by its own admission, carries out a purely executive function.

Finally, the PRA itself is vague in defining the Postal Service's legal status. Even Congress hasn't clearly determined what the Service is, as a 1997 report by the legislature's General Accounting Office declared the Service to be a "corporation-like organization."[26] This report found

[22] 39 U.S.C. § 202(a).
[23] 39 U.S.C. § 202(c)-(d).
[24] 295 U.S. 602 (1935).
[25] Id. at 624.
[26] General Accounting Office, U.S. Postal Service: Issues Related to Governance of the Postal Service, GAO Rept. No. 97-141, at 2 (August 1997).

that while the Service steadfastly maintains that it is not a corporation, "it is frequently considered by others to be one and has been previously included in major government corporation studies done over the last several years."[27] The GAO also reported that former and current members of the Board of Governors "believed that the current legal definition of the Postal Service—an independent establishment of the executive branch—is unclear and causes uncertainties about how far the Postal Service can go in competing with the private sector."[28]

These factors demonstrate that the Postal Service cannot be treated as a sovereign entity under the Constitution. The Court must either recognize this fact and hold that the Service is not entitled to claim sovereign status under its present structure, or declare the Service to be a sovereign entity whose structure violates the Appointments Clause.

b. The Postal Service's non-mail functions and activities are not entitled to sovereign status.

Even if the Postal Service's structure were consistent with Article II's requirements for a sovereign entity, many of the Service's current functions and programs do not fall within the scope of Article I's Post Office Clause.[29] The Service does not simply deliver the mail; it also competes with private businesses in numerous markets outside of the Service's First-Class mail monopoly.[30] A well-known

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[27] Id.

[28] Id. at 21.

[29] U.S. CONST. art. I, sec. 8, cl. 7.

[30] The Post Office Clause does not require the government to maintain a coercive mail monopoly. Compare this with the earlier Articles of Confederation (1781), which granted Congress the "sole and exclusive" power to maintain an interstate postal system. Art. IX, cl. 4. It's also noteworthy that the British Crown's re-imposition of a postal monopoly on the American colonies in 1711 led the Virginia House of Burgesses to employ the Revolutionary phrase "no taxation without representation" in response to the monopoly's arbitrary postage rates. *See* GERALD CULLINAN, THE POST OFFICE DEPARTMENT 7-10 (Fredrick A. Praeger 1968).

example is package and express document delivery, where the Service competes with firms like Federal Express and United Parcel Service.

Another example is the Postal Service's recent expansion into online payment products. The Service offers various Internet-based products that enable customers to pay their bills, send money to individuals, and remit payment for online auctions. These product lines did not originate with the Service but rather with private firms. Indeed, these products are partially designed to bypass the Service's First-Class mail monopoly by offering customers a cheaper, more efficient means of making payments. At its core, however, these products are a form of financial services—not postal mail. While the Postal Service is legally permitted to offer online payment products, such products do not fall within the plain meaning of the powers assigned to the Government under the Post Office Clause.[31] The same can be said for the other non-mail product lines maintained by the Service.

It is also the case that the Postal Service's non-mail products distract the Service from providing its essential mail services mission. Often the Service's non-mail activities yield no tangible public benefit while expending Service funds. For example, earlier this year the Postal Service's inspector general reported that nearly $48 million spent by the Service on professional athletic sponsorships—most notably the professional cycling team led by Lance Armstrong—"lacked goals and objectives"[32] and failed to raise any verifiable revenue. The OIG questioned why the

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[31] The Postal Service provides its Internet-based services through its website at www.usps.com. This itself is noteworthy because government entities use Internet domains that end in ".gov", while ".com" domains are reserved for purely commercial usage.

[32] UNITED STATES POSTAL SERVICE, OFFICE OF THE INSPECTOR GENERAL, POSTAL SERVICE'S INVOLVEMENT IN SPONSORSHIPS, Audit Rept. No. OE-AR-03-003, at 4 (2003).

Service would sponsor a cycling team "whose major event is the Tour de France when the primary job of the Postal Service is to deliver mail domestically,"[33] a valid concern given the Service's loss of nearly $1.6 billion in 2001.[34]

While the Postal Service's spending habits are not before this Court, the Service's claim of sovereign status must be viewed in light of its full complement of activities. Recognizing the Service as a sovereign entity would grant the Service—and the Government generally—unlimited authority to engage in commercial competition without being subject to the same rules as private competitors, namely the antitrust laws. This is wholly inconsistent with the American concept of sovereignty, because it is unreasonable to assume that the sovereign—the people—would create an entity that competes against private business interests without having to adhere to the same basic rules as those businesses. Furthermore, it is unreasonable to assume the people would permit such an entity to be substantially removed from the functions (and structure) authorized by the Constitution itself. Consequently, the Court should not create a sovereign refuge for the Postal Service's commercial, non-mail activities.

II. The alleged impact of subjecting the Postal Service to antitrust suits is insufficient to warrant reversal of the decision below.

The Postal Service argues that subjecting it to current and future antitrust litigation "could impose significant expenses and delay on Postal Service operations that would inevitably flow from having to defend against antitrust claims."[35] The Service pleads with the Court to consider "economic uncertainties" and other public policy factors in

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[33] Id. at 15.
[34] Id. ay 14.
[35] Pet. 18.

reviewing the legality of the Ninth Circuit's decision.[36] But while CAC concedes the potential costs of affirming the decision below, this alone does not warrant granting the Service a total judicial exemption from the antitrust laws. The Service's effort to use unrelated policy arguments that do not address the question presented in its petition is a red herring, and should not be given any weight by the Court.

However, an interesting question arises from the Postal Service's public policy argument, i.e. whether the Service's legislative mandate under the PRA should be read as outweighing the concurrent legislative mandate contained in the antitrust laws. CAC takes no position on this issue, as we question the constitutionality of both the existing Postal Service and the antitrust laws, but we note that recent precedent supports the use of antitrust to thwart the congressional objectives of a government agency. Last year the Federal Trade Commission concluded a consent order with the National Academy of Arbitrators ("NAA")[37], an honorary society of labor-management neutrals that maintains a professional ethics code in direct consultation and coordination with the Federal Mediation and Conciliation Service ("FMCS"), an independent agency of the Executive Branch.[38] Despite FMCS' participation in, and active supervision of, NAA's ethics code pursuant to the agency's legislative mandate, the FTC nevertheless asserted jurisdiction to challenge portions of the ethics code under the antitrust laws. NAA settled the case without challenging the FTC's claims, but FTC officials never consulted FMCS about the NAA matter, despite FMCS' longstanding jurisdiction over NAA's affairs.[39]

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[36] Pet. 19.
[37] *In the Matter of National Academy of Arbitrators*, FTC File No. 011-0242 (Final Consent Order Dated Jan. 17, 2003).
[38] 29 U.S.C. § 172, *et seq.*
[39] *See* Comments of Citizens for Voluntary Trade at 3-7, FTC File No. 011-0242 (Dec. 20, 2002) (comments on file with FTC).

While not precedental or conclusive, the NAA case suggests that government antitrust officials see no ordinary conflict between a broad legislative mandate and the broad objectives of antitrust enforcement. CAC does not endorse this expansive view of antitrust policy, but acknowledges contemporary antitrust policy for what it is, especially in light of the Postal Service's argument that subjecting it to antitrust liability would compromise congressional intent:

> In addition, respondents' position [favoring the Ninth Circuit's judgment] would permit courts, rather than Congress, to determine when and whether the Postal Service's operations are anti-competitive, and if so, whether its operations were not sufficiently authorized by Congress such that the Postal Service should be liable for the severe sanctions imposed by the antitrust laws.[40]

This is a reversal of traditional antitrust theory. While it would be nice if every American business could know under what circumstances their actions are "anticompetitive," the reality is that antitrust laws are enforced according to a set of judicially- and executive-created doctrines that define the precise scope of the antitrust laws, which themselves are nothing more than a set of vague policy pronouncements. Antitrust law has never been well-defined by Congress, and the Postal Service is entitled to no greater degree of certainty than the average American business in this respect.

Finally, the Postal Service's central thesis in this case—that the antitrust laws were never meant to be applied to entities like the Service—cannot be accepted as a definitive view of congressional intent, because the Service, as currently structured, did not come into existence until some 80 years following the passage of the first antitrust law, the Sherman Act. Indeed, the antitrust laws precede the concept

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[40] Pet. Reply Brief at 9.

of a hybrid government-corporate entity with the Service's broad commercial scope. Furthermore, there is no evidence in the legislative history of the PRA which demonstrates that Congress considered potential policy conflicts between the PRA and the antitrust laws. It would be reasonable to afford the lower courts an opportunity to develop more substantive case law on this issue before this Court forecloses any future antitrust actions against the Service. And in any case, Congress remains free to grant the Postal Service an express antitrust exemption along the lines the Service seeks in this case. But in the absence of clear statutory language, this Court should not infer an antitrust exemption of any kind for the Service with respect to non-mail services.

CONCLUSION

The Postal Service presents no compelling or persuasive argument for reversing the holding of the Ninth Circuit. Even if the "sue-or-be-sued" language of 39 U.S.C. § 1001 is insufficient to subject the Service to the antitrust laws, the numerous independent grounds discussed above provide an adequate basis to find the Service is a "person" for purposes of the antitrust laws. Therefore the judgment should be affirmed.

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Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF POSTALWATCH INCORPORATED AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

PostalWatch Incorporated ("PostalWatch") is a not-for-profit Virginia corporation organized in 1999, and exempt from income tax under § 501(c)(4) of the Internal Revenue Code. The principal functions of PostalWatch are to monitor, report to the public and policymakers on, and comment upon the operations, regulatory actions and competitive activities of the United States Postal Service. PostalWatch seeks to encourage honesty, efficiency, and responsiveness to public needs on the part of the Postal Service. PostalWatch seeks to discourage wasteful, unnecessary and anticompetitive activities by the Postal Service, which could stifle and distort competition across broad areas of the economy.

SUMMARY OF ARGUMENT

The issue in this case has broader dimensions and implications than either party has explicitly or fully addressed, or the Ninth Circuit fully explicated.

USPS has become a commercial entity, an economic person, with actual and potential effects on many markets, not merely those affected by procurement decisions. In broader context, in its current form and in essential function, USPS is part of a large and progressively proliferating set of

[1] PostalWatch files this brief with the consent of all parties. The letters granting consent have been filed with the Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than PostalWatch or its counsel, make a monetary contribution to the preparation or submission of this brief.

communications and transportation services available to the public. Such services do not require sovereign status for their provision.

Increasingly beset by direct and indirect competition, USPS has expanded into lines of commerce beyond the scope of those mandated it by Congress. However, the protections from competition currently provided USPS's mail delivery functions afford it unique opportunities to stifle and distort competition in markets directly related to mail delivery and in other communications and transportation services. Any broad status-based exemption from the antitrust laws for activities outside its congressionally mandated mail delivery function, in any line of commerce, would create broad anticompetitive potentials subject to no adequate check.

The antitrust laws embody the fundamental national policy in favor of a competitive economy, which is to be given the broadest feasible applicability. The construction of Congress's specification that the Postal Service may "sue and be sued" to allow applicability of the antitrust laws to anticompetitive USPS activity, while maintaining "conduct based" antitrust immunity tailored to the precise contours of Congress's grant of a charter to perform mail services with an attendant monopoly, would effect a necessary and appropriate accommodation of relevant policies – indeed, the only rational resolution under current conditions.

The rationales for exemption from the antitrust laws offered by the Solicitor General on behalf of the Postal Service have little weight, are self-serving, and are inconsistent with its own administrative practice.

ARGUMENT

I. USPS is a substantial, competitive commercial person that fiercely competes in a number of markets, though it persistently seeks to deny that status and don the cloak of sovereignty to avoid restraints on anticompetitive conduct.

The Postal Reorganization Act of 1970 (PRA) specifically formulated the Postal Service as to operate less as a government entity and more along the lines of a business. Several features of that architecture, with which PostalWatch has become familiar in its observations of the USPS's operation, should be appreciated to give adequate scope to this formulation under current conditions.

The Act set up a Board of Governors, which is analogous to a Board of Directors, under which functions, a chief executive officer – the Postmaster General.

The Service was to recover its operating expenses from charging postage fees for its services in the market, rather than to be funded by congressional appropriations. Though it was allowed to borrow from the Treasury, the legislative design clearly mandated the Service be self-sustaining and breakeven over time.

The rates of the USPS are governed in a fashion similar to the practice in regulated industries where limited grants of monopoly have been allowed commercial entities – that is, through the use of a rate-reviewing commission: in this case the Postal Rate Commission. The scope of this Commission's authority is currently, however, more limited than those of traditional regulatory agencies, in that it operates largely in an advisory capacity.

In support of the business-like formulation, Congress freed the Postal Service from direct Executive Branch influence. In addition, Congress mandated that USPS be self-sustaining and thus divorced from the Congressional controls inherent in the appropriations process. In further support of the business-like formulation, the PRA took USPS off-line from normal agency-like oversight and removed it from "Agency" status as defined in the Administrative Procedure Act (APA).[2]

> Application of other laws (a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.[3]

The USPS exemption from the Administrative Procedure Act, taken with the APA's distinction between those entities subject to its scope (agencies), and those not (persons), suggests that the USPS should be treated as a "person" rather than an "agency" in the situation presented this Court.

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[2] 5 U.S.C. § 551 – Definitions – (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include ... (2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency.

[3] 39 U.S.C. § 410 – Application of other laws.

The USPS values and frequently exploits its non-agency personhood, regularly claiming the status and characteristics of a commercial entity where that is to its advantage.

In claiming exemption from the Administrative Procedures Act, USPS does not comply with the Paperwork Reduction Act or the Small Business Regulatory Flexibility Act. USPS regularly claims to be exemption from agency rulemaking notice and comment requirements and is not required to adhere to normal governmental purchasing procedure and controls.[4]

The Service regularly denies[5] Freedom of Information Act (FOIA) requests, citing a FOIA exemption[6] for "information of a commercial nature."

The USPS regularly registers its trademarks and copyrights, has abandoned its governmental www.usps.gov web address in favor of the commercial www.usps.com and regularly sells, licenses or otherwise profits from the commercialization of its intellectual property. It generates tens of millions of dollars from the licensing of its change-of-address database, address correction data and stamp artwork for commercial reproductions sold to the public.

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[4] See Wickwire Gavin, *What are the major differences between USPS's purchasing regulations and those of other federal agencies? at* http://www.wickwire.com/practice/postal/postalfaqs.htm#dozen.

[5] For the USPS's perspective on its FOIA exemption see: Postal Rate Commission, *Substantive Comments of the United States Postal Service*, PRC Docket No. RM2003-3 (July 2, 2003) *available at* http://www.prc.gov/docs/38/38562/Substantive.comments.final.rev.doc.

[6] 39 U.S.C. § 410(c)(2).

Taking all these factors and others into account, the General Accounting Office has characterized the Postal Service as a "corporation-like organization".[7]

It is true, as the Solicitor General suggests in his brief that in 1970 Congress surely intended that the USPS continue a service widely depended upon by the general public. It is also true that the USPS is limited to a significant degree in its management discretion as to facilities, rates and other matters directly related to its letter-mail monopoly. These limitations are largely symmetrical with and counterbalanced by its protections from competition.[8]

These factors recognized, it is obvious that Congress moved in the direction of making the Postal Service operate along the lines of commercial enterprises, and in doing so waived sovereign immunity for commercial conduct. As the 9th Circuit Court observed, in this context the "sue and be sued" clause of U.S.C. 39 should be compelling evidence of Congressional intent that the USPS respond to those laws which generally govern commerce in the United States.

The USPS's effort in this court to remove itself from constraints on anticompetitive conduct by asserting that it

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[7] General Accounting Office, *U.S. Postal Service Issues Related to Corporate Governance*, GAO Report No. GGD-97-141, at 2 (August 1997).

[8] Whether these symmetries and counterbalances in fact work out well in an increasingly diverse and competitive United States market is by no means currently clear or assured in the future. This version of the "regulatory compacts" long prevalent in the United States may be unsustainable, as has occurred in other areas. Hence current policy debates on the future of the postal monopoly.

is not a "person" continues a consistent course of action that has been rejected by several lower courts.

The 6th Circuit Appeals Court in *Federal Express Corporation v. United States Postal Service*, 151 F.3d 536 (6th Cir. 1998) observed a recurring pattern of behavior:

> As previously indicated, this circuit adopts the well reasoned decisions of the Fourth and Eighth Circuits, which refute USPS's contention that it is not a "person" accountable for its misdeeds proscribed by the Lanham Act. In its arguments, the Postal Service has illustrated a penchant of some federal government agencies and officers to proactively seek the benefits and protections afforded by the law while simultaneously endeavoring to avoid the responsibilities and burdens imposed by legal restraints and standards of conduct, which constrain others. In this case, despite its apparent vigorous participation, as a quasi-private enterprise, in roiling free market competition with private sector commercial document carriers, the Postal Service has hastily elevated the shield of governmental privilege when accused of competitive wrongdoing. . . . Congress did not intend to launch [USPS] into the commercial world and also to immunize USPS from liability for federally-created commercial torts such as the Lanham Act.

In rejecting similar immunity claims in the 1998 tort action *Global Mail Ltd. v. United States Postal Service,* 142 F.3d 208 (4th Cir. 1998) the Fourth Circuit concluded,

> USPS is not an enterprise that occasionally affects commercial firms indirectly in its endeavors. Rather, the language and the legislative history of the PRA make clear that Congress intended USPS

> to be a full-fledged competitor in the business of carrying letters, parcels and packages, and USPS has fulfilled that intention by competing head-to-head with a host of private courier services. . . . In sum, we hold that § 409(c) does not limit the PRA's waiver of sovereign immunity such that USPS is liable in tort only for those torts cognizable by the FTCA.

The Sherman Act is designed primarily to protect competition, rather than competitors. But firms throughout the economy have a protected interest in the opportunities available in competitive, unconstrained markets. And the general public has an interest in the benefits of such free and fair competition. Such competitive opportunities and public benefits will not be available in full measure where the USPS is allowed to participate in private competitive markets yet evade antitrust strictures by denying "personhood."

II. The Postal Service today represents but a fraction of a large and proliferating set of communication and transportation services which bind the nation together, and link the nation with others. None of these services require sovereign status for their provision.

In this proceeding, the Postal Service attempts to cast its role as "quintessentially sovereign." If that were ever the case, it is no longer the case in the today's communication and transportation environment.

When the Constitution was cast, its essence was to link together diverse states into one political and commercial entity. It therefore endowed Congress with the ability

to facilitate commerce between the States in general, including communications. Thus, in Article 1, Chapter 8, Clause 7, Congress was authorized, not directed, "To establish Post Offices and Post Roads". This was a limited grant of authority, upon which Congress expanded to create the modern-day Postal Service.

Communication capabilities were relatively limited in 1789. But during the past two centuries, means of communications have proliferated greatly. Progressively, telegraph, telephone, "facsimile", radio, television, "courier" services, and now the Internet continue to weave an ever-denser web of communications services binding the Nation together.

The Postal Service's share of this expanding communication sector was 10 percent in 2001, trending downward from nearly 12 percent in 1998.[9]

The "e-mail" feature of the Internet, taken alone, now accommodates roughly twenty-two times the message

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[9] In 2001, "Broadcasting and telecommunications" (1997-NAICS 513), "Couriers and messengers" (1997-NAICS 492), "Online information services" (1997-NAICS 514191), and the Postal Services (1997-NAICS 491110) generated revenues totaling $642.6 billion, of which USPS's $65.8 billion represented 10.2 percent. The Postal Service's share of these categories continues to trend downward from 1998 when revenues of $60.1 billion represented 11.9 percent of the combined total of $501.2 billion (NAICS code 513 includes wire-line and wireless telephony, cable TV networks and distribution, and radio and television broadcasting, NAICS 492 includes messenger services, and air and ground parcel deliverers, and NAICS 514191 includes internet service providers). U.S. Census Bureau, *2001 Service Annual Survey* (Feb. 2003) at pp. 8, 16 and 17, available at http://www.census.gov/svsd/www/sas01rpt.pdf, U.S. Postal Service *2001 Annual Report* at 21, U.S. Postal Service *1998 Annual Report* at 57.

volume of physical mail.[10] Such messages are cheaper, faster, and much more easily manipulated and disseminated than letter messages.

These communications services have generally been performed by private, rather than government, entities, in the United States.

Thus, demonstrably, it is no longer necessary that the "sovereign" perform communication services, in order to bind the nation together. There is nothing inherent in the function of transporting messages written on paper, using ink, or like materials, between private, commercial, and other parties in the United States, which uniquely requires sovereign status or sovereign immunity.

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[10] In the rapidly expanding, mutable Internet world, census data becomes quickly out of date. InfoWorld Magazine reported on September 26, 2002, an International Data Corporation study pegging worldwide e-mail message volume at 31 billion messages daily, projecting 60 billions daily by year 2006. The final report of the President's Commission on The United States Postal Service states that the approximately 200 billion pieces of mail the USPS delivers each year makes up roughly 40% of the worldwide mail volume. Thus worldwide mail volume is approximately 1.4 billion letters per day or 1/22 the global volume of e-mail. A July 18, 2003 ComputerUser.com report puts the United States share of internet traffic at about 45%. InfoWorld Magazine, *You've got mail: 60 billion a day by 2006* (September 6, 2002) at http://www.archive.infoworld.com/articles/hn/xml/02/09/26/020926hnemail6b.xml?s=IDGNS; International Data Corporation, *Worldwide Email Usage Forecast, 2002-2006*, IDC Doc #27975 (September 2002) at http://www.idc.com/getdoc.jhtml?containerId=27975&pid=35178981, President's Commission on The United States Postal Service, *Embracing the Future*, at 18 (July, 2003) *available at* http://www.treas.gov/offices/domestic-finance/usps/pdf/freport.pdf, ComputerUser.com, *Study – 55 percent of world's Web traffic non-U.S.* (January 25, 2001) *at* http://www.computeruser.com/news/01/01/25/news6.html.

Indeed, mounting competitive pressures on USPS have put in question its continued viability in its current form. This, and a worldwide tendency toward deregulation and privatization of functions historically performed or regulated by government entities,[11] has led to considerable scholarly discussion on needs to reorganize USPS, including suggestions that the postal monopoly should be abolished.[12]

Various legislative "reform" proposals have been offered in Congress in recent years. A Presidential Commission empanelled to study the USPS has recently issued its report[13] and recommendations, which will undoubtedly be followed by new legislative initiatives.

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[11] Recognizing a reduced dependence on hard-copy communications and the changing needs of their citizenries, many industrialized nations around the world are making significant strides in liberalizing and de-monopolizing their, once perceived to be necessarily governmental, postal and telecommunication authorities. For a brief overview demonstrating the trend towards liberalization and de-monopolization of foreign postal administrations see The President's Commission on the United States Postal Service, *Statement of James I. Campbell*, at 22 (February 20, 2003), *available at* http://www.treas.gov/offices/domestic-finance/usps/testimony-docs/campbell.pdf.

[12] See, for example, Peter J. Ferrara, *Free the Mail: Ending the Postal Monopoly*, Cato Institute (1989); Rick Geddes, *Neither Snow Nor Sleet . . . Can Dampen This Monopoly*, Hoover, Digest No. 2, 2000, (2000) *available at* http://www-hoover.stanford.edu/publications/digest/002/geddes.html.

As to protecting competitors from extension of the USPS monopoly into competitive lines of commerce, see Sidak and Spulber, *Protecting Competition From the Postal Monopoly*, AEI Press (1996).

[13] President's Commission on The United States Postal Service, *Embracing the Future* (July, 2003) *available at* http://www.treas.gov/offices/domestic-finance/usps/pdf/freport.pdf.

All this is not to say that traditional mail services are not a significant service. Though economic forces press increasingly hard on the historically evolved postal service structure, necessary institutional adaptations will be carefully and contentiously hammered out. The historically developed expectations of mail service by individual citizens and various constituencies, such as commercial mass mailers, will condition the pace and scope of change in the ways mail services will be defined and delivered in the future.

Our basic point is this: the imperial robes in which the USPS has garbed itself in this proceeding, as a sovereign entity performing a uniquely sovereign set of services, are, in economic terms, in today's communications markets, diaphanous. Workable law related reasonably to economic reality, we suggest, cannot be premised off the USPS's time worn, self-serving, increasingly transparent pretensions.[14]

III. USPS seeks impermissible blanket immunity from the antitrust laws for anticompetitive conduct in any and all lines of commerce.

The USPS has traditionally offered parcel post and other "special" services, as non-monopoly, "non jurisdictional" or "non-postal" services competitive with private sector services.

[14] For a perceptive economics oriented perspective on the antitrust law issues presented in this case see, Michel Schuyler, *Antitrust Law and the Postal Service*, Institute for Research on the Economics of Taxation (August 25, 2003) at ftp://ftp.iret.org/pub/ADVS-159.PDF.

As alternative technology, communication and transportation markets have evolved – particularly e-mail – and USPS revenues have been subjected to increasing competitive pressure, the USPS has responded by attempting to develop services of the sort used by its direct and indirect competitors. One illustrative example is USPS eBillPay and Send Money, which provides USPS-branded bill presentment services and person-to-person transfers and bill payments with electronic cash transfers.

Recently Consumer Action, a California based consumer watchdog organization, joined by the Postal Rate Commission's Office of Consumer Advocate, has petitioned[15] the Postal Rate Commission to inquire into the financial results of such initiatives. In its petition, Consumer Action lists fourteen services about which it is concerned. Postal management's response in PRC Docket *2003 furnishes the most recently available public catalogue of USPS's "non-jurisdictional" initiatives,[16] beyond its traditional mail service programs.

We think it fair to say that at this point USPS's initiatives are exploratory and in the process of evolution. It is also fair to say that USPS clearly seeks to expand upon the scope of services directly and clearly authorized by Congress.

[15] Postal Rate Commission, *Petition of Consumer Actions for Review of Unclassified Services*, PRC Docket *2003, (10/15/2002) *available at* http://www.prc.gov/dockets.asp?node=dbt&ID=%2A2003.

[16] Postal Rate Commission, *Comments of United States Postal Service on Consumer Action Petition*, PRC Docket *2003 (1/30/2003) *available at* http://www.prc.gov/docs/36/36904/USPSComments_CA-OCA_Petn.pdf.

Such initiatives raise a host of significant competitive issues, which will be addressed for years to come.

PostalWatch is concerned about issues of "fair competition." These include issues raised by USPS's clear desire to exploit the best of both worlds – the use of a governmental grant of market protections and claims of "sovereign" status, as well as preferential access to Treasury financing, while aggressively pursuing commercial aims far in excess of its statutory charter. PostalWatch is concerned about issues of cross subsidization, deceptive advertising, dissipation of postal revenues on ill conceived and poorly executed adventures beyond basic postal services, disincentives to economy and efficiency resultant from market protections, and similar issues. Consumer Action and the Postal Rate Commission's Office of Consumer Advocate are apparently concerned about cross subsidization and income dissipation issues, as well.

Private sector vendors of information services are concerned about the effects of a protected monopoly entering competition with them. In a recent filing with the Postal Rate Commission, the Computer and Communications Industry Association (CCIA) points out that the Postal Service has discussed plans to assign e-mail addresses to all Americans or all physical addresses, to take control of the .us web domain, and to deploy computer kiosks in all post offices for sending and retrieving e-mail. CCIA fears more.[17]

[17] In its filing, CCIA quotes former Postmaster General William Henderson articulating the Postal Service's vision, in a published interview, as follows.

(Continued on following page)

As we read the thrust of the Presidential commission's recommendations, they are that the USPS organization be further modified along corporate lines, that its scope be limited to "products and services directly related to the delivery of letters, newspapers, magazines, advertising mail, and parcels" (Report, p. 28), that the universal service obligation be maintained substantially in current form but the USPS be given much more freedom in managing and disposing of facilities, and that the Postal Rate Commission be elevated to an independent regulatory body (termed the Postal Regulatory Board), with modernized, incentive based rate controls.

> And the next [strategy] is to leverage our own electronic infrastructure for commercial purposes. We have on every – on most every – will have on most post offices that have POS, a point-of-sale machine, a backup satellite capability . . . It now has voice and video capability, which makes it an enormous tool, a giant highway, and it's more reliable than optical fiber because we have optical fiber into the POS machines. So it's a huge asset that this organization has, that it's now looking and thinking about who – and you say who could use it? Well, anyone could use it who has a data transmission need. It's completely secure. You would just lock into the post office, and you could transmit data anywhere in the world.

Postal Rate Commission, *Comments of the Computer & Communications Industry Association on the Motion of the Office of the Consumer Advocate to Request That the Commission Institute a Proceeding to Consider the Postal/Nonpostal Character of Specified Services and the Establishment of Rules to Require a Full Accounting of the Costs and Revenues of Nonpostal Services*, PRC Docket *2003, (January 28, 2003) *available at* http://www.prc.gov/docs/36/36838/CCIA_PRC_comments.doc.

As to the scope of the postal monopoly,[18] the Presidential Commission suggested the following:

> The Commission also recommends that the Postal Regulatory Board be tasked with clarifying and administering the scope of the postal monopoly. Given the Postal Service's status both as a monopoly and a competitor, administrative authority over the monopoly should reside outside the institution. It is inappropriate for a commercial organization to decide the scope of a law that restrains its competitors. To the contrary, it is a fundamental premise of American justice that the law should be administered by persons without a financial interest in the outcome. (Report, p. 65).[19]

In issuing certiorari, this Court has undertaken to define the scope of controls external to USPS on anticompetitive conduct, under existing law. We submit that the Court should therefore, in accord with its own traditions and the fundamental concepts recognized by the Presidential

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[18] In describing to the President's Commission the scope of the postal monopoly at present, Campbell observed with acute insight "What most mailers now think of as an ancient monopoly is in truth a set of administrative regulations bearing little relationship to the acts of Congress. . . . At best, the purpose and scope of the postal monopoly law are uniquely murky." Statement of James I. Campbell, *supra*, at 21.

[19] In proposing that a Postal Regulatory Board govern the scope of the postal monopoly, the Presidential Commission did not deal in detail with all of the issues presented in this case. Such issues may – we presume will – surface in Congressional consideration of the Commission's recommendations. The scope of the regulatory authority to be given any such Postal Regulatory Board, if created, and the relationships between its functions and the application of the antitrust laws will, again, presumably, be addressed at that time.

Commission, here and now provide clear guidance that activities beyond the USPS's core monopoly are subject to judicial restraint under the antitrust laws.

Under the extremely expansive, status-based immunity the USPS seeks it would be free to engage in price fixing, market allocations, and other *per se* violations of the antitrust laws, as well as practices otherwise subject to "rule of reason analysis," in any market of its choosing, without, Congressional appropriations related oversight, any direct Executive Branch controls, any regulatory check from the Postal Rate Commission, or any judicial review under the antitrust laws. And it would be free to leverage its statutory grant of monopoly to restrain competition in any such line of commerce, without any such check.

USPS is proposing a massive overreach, based primarily on its proprietary interests rather than governmental needs.

Conceivably this Court could craft a decision on the specific facts of this case which would avoid ruling on such broad ranging matters. But the USPS has asserted such a broad status-based immunity, and the Circuit Court has crafted an approach for disposing of such a claim. If such broad issues are to be addressed, we recommend the approach taken by the Circuit Court below.

IV. The Circuit Court's "conduct based immunity" approach is a reasonable, and necessary, means of reconciling the governmental mandate of monopoly mail delivery, and the application of the fundamental national policy of competition to conduct not within the necessary scope of that mandate.

This Court has long and consistently stated that the fundamental national economic policy of the United States is that of fostering and relying upon competitive markets. E.g., *U.S. v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972); *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 248 (1951).

The USPS argues that apart from the clear "sue and be sued" language, a plaintiff must show that there is an explicit, statutorily mandated right of action against the USPS. But the long-standing rule under the antitrust laws is that they are to be applied absent an explicit statutory immunity, or a "plain repugnancy" between the antitrust laws and any specialized regulatory scheme. See *Otter Tail v. United States*, 410 U.S. 366 (1977); *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1973).

We can agree with the USPS argument that the Congress did not intend that either the government or private parties would be able to maintain actions against the USPS for exercise of its monopoly grant to perform its mandated mail delivery function and acts and practices reasonably ancillary thereto. Putting aside issues of sovereignty, particular causes of action could be plainly repugnant to the basic, specific responsibilities entrusted to the Postal Service, and the (somewhat limited) regulatory system paralleling the grant of monopoly services.

But there is no evidence that Congress intended that the USPS should be free to use the leverage provided it in its basic mail-delivery function to restrain competition in related markets,[20] or to engage in classic anticompetitive behavior to restrain competition in any other sector of the economy which it might choose to enter.

PostalWatch submits that little reflection is required to see that the Postal Service's argument for blanket status-based antitrust immunity for any actions, in any line of commerce, attendant to its claim of "sovereign" status, would lead to absurd and impermissible results. The Postal Service would be free to use the force of government, acting as a "sovereign", to extend its monopoly scope, and to cartelize markets in its own interests, and in the essentially commercial interests, which it shares with actual and potential competitors.

Thus, it appears to us, taking into account the larger scope of competitive issues we have attempted to outline,

---

[20] For example, the Postal Service recently attempted to use its ability to withhold mail to control competition between itself and private mailbox stores, and between such private stores and "business center" operations. USPS engaged in a classic price related agreement among competing entities to structure competition in such markets. Notwithstanding the USPS's arguments to the contrary, we do not think USPS's statement of justifications would survive review under the antitrust laws in a judicial proceeding. See 39 C.F.R. 111 – D042.2.6 – *Domestic Mail Manual – Delivery to CMRA*. The USPS's own Office of Inspector General found Postal Management's actions to lack any adequate evidentiary basis. See: U.S. Postal Service Office of Inspector General, *Review of the Revised Rules Governing Commercial Mail Receiving Agencies*, Audit Report DE-AR-01-002, (April 9, 2001) *available at* http://www.uspsoig.gov/foia_files/DE-AR-01-002%20%20Revised%20Rules%20Governing%20Commercial%20Mail%20Rece.pdf.

one is necessarily led to the view of the Ninth Circuit, to the effect that Courts can, and must, distinguish between those restraints which might be imposed by the Postal Service which are directly and properly attendant to whatever grant of monopoly service Congress may have accorded the Postal Service, and those which are not reasonably ancillary to such monopoly services.

The Circuit Court's invocation of the "conduct based immunity" doctrine aptly integrates deference to the scope of the monopoly currently given the USPS, and the deference to be given to the policy and provisions of the antitrust laws.

V. The practical, or operational, justifications offered for antitrust immunity lack evidentiary basis, are self-serving as to USPS's proprietary interests, and are inconsistent with USPS's own management practices.

The USPS arguments that it should not be burdened by the costs of litigation to determine whether its practices beyond the necessary scope of mail delivery are anticompetitive would be offered by any private firm seeking to avoid constraint on anticompetitive conduct, and can have little weight. Litigation costs are the necessary attendant to judicial review to preserve competition in the economy as a whole, and may be minimized by avoiding anticompetitive conduct.

Any argument that the USPS would suffer great burdens in distinguishing between its basic mail delivery functions and other functions would be meretricious. Postal Service management now regularly makes a number of such distinctions. We have pointed out that USPS

management routinely differentiates between "postal" and "non-postal" services in its efforts to avoid or minimize the impact of Postal Rate Commission review of its prices and classes of service in "competitive" – that is, non-mail – lines of commerce. Its management surely can distinguish between its mail services and other markets affected by mail services, faced with allegations that it is attempting to leverage its monopoly into such related markets.

USPS's bold assertion on p. 28 of the Solicitor General's initial brief on the merits that "Congress has therefore entrusted the Postal Service with the responsibility for determining whether its operations are anticompetitive, and if so whether other public benefits nonetheless warrant its actions" must be given highly qualified meaning.

It is true that within the scope of its monopoly services, the USPS should weigh whether its actions may, as to their impact on other parties, have anticompetitive consequences. But we can see no support in legislative history, in logic, or in sound public policy for extending such an assertion to mean that the Congress has given the USPS a warrant to determine whether and how it will extend its monopoly to restrain competition in markets related to mail delivery but not within its central scope, or freely to engage in anticompetitive conduct in lines of commerce other than mail service.

In mandating that the USPS operate more as a business, Congress was successful in endowing the USPS with a profound proprietary instinct. That instinct should not be allowed the sovereign, indeed imperial, and unchecked, scope which the USPS advocates.

CONCLUSION

If and as this Court addresses the broad issues posed on appeal of the Ninth Circuit ruling, rather than disposing of the claim of Flamingo Industries on grounds particular to it, PostalWatch, as *Amicus Curiae*, respectfully urges the Court to affirm the holding of the Circuit Court below, to the effect that the scope of any immunity of the antitrust laws as may be accorded the USPS be limited to "conduct based immunity" related to the necessities of its specific mandates to deliver mail, that the USPS not be allowed to extrapolate its specific authorities so as to prejudice competition in markets related to mail delivery in contravention of the provisions of the antitrust laws, and that it not be permitted to conduct extensive and expanding commercial undertakings without the checks of the competitive policies embodied in the antitrust laws.

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In The Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

Petitioner

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States Postal Service is subject to suit for violation of the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the Clayton Act, 15 U.S.C. § 12 *et seq.*

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the American Trucking Associations, Inc. (ATA), is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA's membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents more than 30,000 companies and every type and class of motor carrier operation in the United States. ATA's membership includes transportation companies such as FedEx Corporation and United Parcel Service, Inc.

Amicus ATA has a significant interest in ensuring that the antitrust laws apply to the United States Postal Service to prevent it, when acting as a competitor, from engaging in monopolistic or anticompetitive conduct in the market for transportation of property. Complete exemption of a large and powerful competitor such as the Postal Service when acting outside its statutory "letter" monopoly would seriously interfere with the competitive operation of the marketplace. Moreover, permitting the Postal Service alone to be free from the antitrust laws' proscriptions would create an uneven playing field for competitors. Such conduct discourages innovation and increases prices, thus injuring consumers.

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A. Congress intended that the federal antitrust laws apply to all types of persons that are capable of monopolizing commercial markets or restraining trade because Congress enacted those laws to ensure that the market encourage economically efficient behavior and innovation to benefit consumers. Accordingly, this Court has held that the definition of "person" for purposes of the Sherman Act, 15 U.S.C. § 7, and the Clayton Act, 15 U.S.C. § 12(a), includes governmental entities such as States, foreign nations, and municipalities so that such entities are subject to suit for violation of those laws. *See, e.g., Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978). The court of appeals correctly held that the United States Postal Service (Postal Service) is similarly subject to suit for violation of the federal antitrust laws when it participates in competitive markets.

This Court's ruling in *United States v. Cooper*, 312 U.S. 600 (1941), that the United States was not included in the term "person" for purposes of bringing a damages action under former Section 7 of the Sherman Act, is not to the contrary. First, this Court has held that there is a presumption against implying an exemption from antitrust coverage that applies when determining who is an appropriate defendant under those laws. Second, longstanding precedent makes clear that determining whether an entity that is related to the federal government should be treated as the "United States" under a particular statute is not automatic, but requires a contextual inquiry based on the congressional intent underlying the statute. *See, e.g., Arkansas v. Farm Credit Servs.*, 520 U.S. 821 (1997); *United States Shipping Bd. Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U.S. 415 (1928). Third, the ruling in *Cooper* was based on the "scheme and structure" of the antitrust statute, which elsewhere explicitly authorized the United States to bring alternative kinds of actions under the federal antitrust laws. That rationale does not apply to the Postal Service, which is not elsewhere authorized by the statute to bring any type of action under the

federal antitrust laws. Indeed, the Postal Service itself has recognized on a prior occasion that it is not part of the United States in the context of the United States suing under the antitrust laws. *See United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978).

B. Nothing in the statutes governing the Postal Service reflects an intent by Congress to exempt the Postal Service from federal antitrust laws and thereby provide it a competitive market advantage. To the contrary, the statutory text demonstrates that Congress intended that the Postal Service, when acting outside of its statutory monopoly relating to First Class or "letter" mail under the Private Express Statutes, 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601-606, be treated like the other participants in competitive markets and not as the United States. Congress expressly reorganized the Postal Service in 1970 as an "independent establishment," 39 U.S.C. § 201, and not as an agency or instrumentality of the United States. Congress also removed the Postal Service from the general supervision of the President and placed it in a category different from the typical executive branch entity.

Congress's intent to establish the Postal Service as independent and distinct from the United States is evident from the structure of the Postal Reorganization Act of 1970. Congress expressly stated in certain specific statutory provisions that it intended the Postal Service to be afforded a particular privilege that is afforded the United States. Congress thus made clear that it did not intend for the Postal Service generally to be able to take advantage of the privileges of the United States. None of the provisions in which Congress granted the Postal Service particular authority, such as eminent domain, provides support for the argument that Congress intended the Postal Service to be included under *Cooper*'s antitrust exemption for the United States. Moreover, Congress's express grant of authority to the Postal Service to "sue and be sued in its official name," 39 U.S.C. § 401(1), not only constitutes a waiver of sovereign immunity against damage actions, but also confirms that Congress intended the

Postal Service to be legally distinct from the United States.

The statutory text and history demonstrate that Congress's overriding purpose in enacting the Postal Reorganization Act was that the Postal Service "be run more like a business." *Franchise Tax Bd. v. USPS*, 467 U.S. 512, 520 (1984). That purpose negates any suggestion that Congress intended to exempt the Postal Service from the antitrust laws and thereby grant it a competitive advantage in the private marketplace where it competes in providing a wide range of products and services. Such an exemption would undermine the goal of the antitrust laws of ensuring efficiency and furthering consumer welfare.

The United States Department of Justice has recognized that the Postal Service is a business-like person appropriately subject to the antitrust laws. In a submission to the Postal Rate Commission, the Department noted that neither case law nor public policy indicated that the Postal Service enjoyed a comprehensive immunity from the federal antitrust laws. The Department based that view on a multi-step analysis that relied on the Postal Service's own prior position and the statutory text and structure.

C. Application of the federal antitrust laws to the Postal Service is not precluded by the nature of the postal monopoly or the remedies available under those laws. Congress's grant to the Postal Service of a monopoly to provide particular services in a particular manner does not preclude application of the federal antitrust laws to its conduct in other areas, as this Court's precedents make clear. Indeed, the Postal Service itself, in June 2002, endorsed a legislative proposal that would have expressly confirmed that it is subject to the Sherman and Clayton Acts with regard to its competitive activities. The Department of Justice similarly supported that provision to clarify existing law. Support of that legislation necessarily acknowledges that antitrust coverage is not inherently incompatible with the Postal Service's responsibilities and authority.

The normal availability of treble damages for violations of the antitrust laws does not indicate a congressional intent to exempt the Postal Service from those laws. The Lanham Act, which the Postal Service acknowledges applies to it, also provides for such a remedy. Further, this Court has held that the potential availability of treble damages is no reason to hold that a person is not covered by the antitrust laws, because it may be possible to read the laws to preclude such a remedy in certain situations.

ARGUMENT

THE POSTAL SERVICE IS SUBJECT TO SUIT FOR VIOLATION OF THE FEDERAL ANTITRUST LAWS

Congress enacted the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, to reorganize the United States Postal Service (Postal Service) as an "independent establishment," no longer part of the political branches of government, and to encourage it to act more like a business. *See Franchise Tax Bd. v. USPS.*, 467 U.S. 512, 520 (1984).

Over the course of the intervening thirty years, the Postal Service has competed head-to-head with private enterprises, including marketing products (such as telephone calling cards, packing material, and stationery) and services (such as electronic billing and delivery of packages) over which it holds no statutory monopoly. Nothing in the Postal Reorganization Act or in the antitrust laws suggests that Congress intended the Postal Service to be free from the federal antitrust laws' prohibitions against anticompetitive and monopolistic behavior while acting in such competitive markets and outside its "letter" monopoly under the Private Express Statutes, 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601-606. Rather, the statute establishing the Postal Service, including its "sue and be sued" provision, reflects Congress's intent to include the Postal Service within the antitrust laws' scope.

Respondents, as the plaintiffs in this case, alleged that petitioner Postal Service violated the substantive provisions of both the Sherman Act, 15 U.S.C. § 1 *et seq.*, and Clayton Act, 15 U.S.C. § 12 *et seq.*, by suppressing competition and creating a monopoly in the production of mail sacks. Respondents brought their claims under Section 4 of the Clayton Act. Section 4 authorizes "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" (which includes the substantive provisions of the Sherman Act as well as the Clayton Act) to "sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent." 15 U.S.C. § 15(a); *see id.* § 12(a) (defining "antitrust laws"). Section 4 does not delimit who is an appropriate defendant. Most of the substantive antitrust provisions invoked by respondents in their complaint, however, impose their obligations only on "[e]very person," 15 U.S.C. § 2 (Section 2 of Sherman Act), or "any person," *id.* § 13 (Section 2 of Clayton Act); *id.* § 13a (Robinson-Patman Antidiscrimination Act); *id.* § 14 (Section 3 of Clayton Act), thus apparently requiring a defendant to be a "person" in order to be subject to suit under these provisions.[2]

[2] Section 1 of the Sherman Act, one of the other substantive provisions invoked by respondents in this case, does not limit its scope to "persons." *See* 15 U.S.C. § 1. It may be that even if the Court declines to interpret "person" to include the Postal Service, respondents' claim under Section 1 should proceed. *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices *by whomever they may be perpetrated.*" (emphasis added)).

A. The Postal Service Does Not Fall Within The *United States v. Cooper* Antitrust Exemption That Applies To The United States, But Not To Other Governmental Entities

1. Entities engaged in governmental functions are not generally exempted from the antitrust laws

This Court has compared the Sherman and Clayton Acts to the Bill of Rights and the Magna Carta as sources of economic freedom. *See United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). Those statutes aim to promote consumer welfare through market efficiency and innovation by preventing the use of anticompetitive or monopolistic conduct. Their capacious language reflects Congress's intent that entities that might restrain competition or monopolize commercial markets, regardless of their nature or origin, be included within the statutes' coverage. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944) ("On its face [the Act] shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.").

Both the Sherman and Clayton Acts define the term "person" to "include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 15 U.S.C. § 7 (Section 8 of Sherman Act), § 12(a) (Section 1 of Clayton Act). By introducing that list with the term "include," Congress made clear that "person" is not limited to corporations or associations. As the Court explained in *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312 (1978), when it held that foreign sovereign states are "persons" under the federal antitrust laws, "[i]t is apparent that this definition is inclusive rather than exclusive, and does not by itself imply that a foreign government, any more than a natural person, falls without its bounds."

Embracing this inclusive approach for the past hundred years, the Court has held that the term "person" in the antitrust laws extends to entities engaged in governmental functions. Rejecting any "mechanical rule" that "the word 'person' as used in the antitrust laws excludes all sovereign states," *id.* at 316, 318, the Court has held that municipalities and States, as well as foreign nations, all fall within the scope of the antitrust laws both as plaintiffs, *see Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (municipalities); *Georgia v. Evans*, 316 U.S. 159, 162 (1942) (States); *Pfizer v. Government of India*, *supra* (foreign nations), and as defendants, *see City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 396-397 (1978) (municipalities); *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 156, 171 (1983) (States). Persons are therefore not excluded from the coverage of the antitrust laws merely because they exercise governmental authority or engage in a "traditional government function." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55 & n.18 (1982).

2. This Court has consistently declined to extend privileges granted the United States automatically to related governmental entities

The Postal Service's argument for why it is not a "person" under the antitrust laws is that it falls within the exemption for the United States that was identified by the Court in *United States v. Cooper Corp.*, 312 U.S. 600 (1941). *Cooper* held that the United States could not bring suit under Section 7 of the Sherman Act (subsequently superceded by Section 4 of the Clayton Act, 15 U.S.C. § 15), which authorized suits for damages by "any person who shall be injured." 312 U.S. at 604, 614. But this Court has held that there is a "presumption against implied exclusions from coverage under the antitrust laws" in determining who is an appropriate defendant under those laws. *City of Lafayette*, 435 U.S. at 398. Thus, the Postal

Service is presumptively not covered by *Cooper*'s narrow exemption for the United States.

Although the Postal Service repeatedly invokes the label "agency or instrumentality" of the United States (USPS Br. 8, 9, 10, 17, 19, 22, 24), that is *not* the designation that Congress gave the Postal Service. *See* pages 15-17, *infra*. Even if it were, the mere designation of an entity as an "agency or instrumentality" does not entitle it to take advantage of the antitrust exemption intended for the United States. There is no blanket rule that any federal entity labeled an "agency" or "instrumentality" is entitled to all the benefits and protections to which the United States itself is entitled. Instead, this Court has stressed that determining whether an entity should be treated as the "United States" under a particular statute is a contextual inquiry based on the congressional intent underlying the statute.

For example, in *Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997), the Court held that a Product Credit Association, an entity clearly designated by statute as an "instrumentality of the United States," 12 U.S.C. § 2071(b)(7), was not entitled to the exemption from the Tax Injunction Act, 28 U.S.C. § 1341, that the Court had previously implied for the United States in *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). The Court explained in *Farm Credit Services* that "instrumentality status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act." *Id.* at 832. This was so even though the instrumentality's "mission is defined and controlled by federal law," *id.* at 828, and it is entitled to immunity from state taxes as "a consequence of its status as a federal instrumentality." *Id.* at 829.

The *Farm Credit Services* Court emphasized that "[a]n instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes * * * without the further inference that the instrumentality has all of the rights and privileges of the National Government." *Ibid.* The Court made clear that a close examination of the

instrumentality in question and the purposes underpinning the particular right at issue is required. *See id.* at 829-832.[3]

Similarly, in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), the Court summarily rejected the claim of the Federal Deposit Insurance Corporation (FDIC) that it was entitled to the same treatment as the United States in determining when to apply federal common law. The Court simply responded: "[b]ut the FDIC is not the United States." *Id.* at 85.[4]

Another example of the rejection of a blanket rule is a trilogy of cases concerning the United States Shipping Board Emergency Fleet Corporation – *United States v. Strang*, 254 U.S. 491 (1921); *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922); and *United States Shipping Board Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U.S. 415 (1928). The Court described that entity as an "instrumentality of the Government of the United States" that had been vested with "enormous power," including the power

[3] This approach is consistent with the views expressed by the United States in that case. The United States argued there that mere designation as an instrumentality of the United States did not entitle an entity to take advantage of an exemption intended for the United States alone. *See* Brief for the United States as *Amicus Curiae* at 21, *Arkansas v. Farm Credit Servs.* (No. 95-1918) ("Numerous cases in the lower courts have recognized that an entity may be a 'federal instrumentality' for some purposes but not others."). *But compare* USPS Br. 19-20 & n.6 (citing Product Credit Association as an example of an agency or instrumentality that is "part of the federal sovereign").

[4] The FDIC is an entity created by federal law with a structure similar in some respects to that of the Postal Service. *See* 12 U.S.C. § 1812(a) (majority of FDIC's Board of Governors appointed by the President with the consent of Senate), § 1819(a)(10) (FDIC authorized to promulgate rules and regulations), § 1819(b)(1) (providing that FDIC "shall be an agency of the United States for purposes of section 1345 of title 28"), § 1818(c) (FDIC may issue cease-and-desist orders), § 1825(d) (obligations of FDIC backed by the full faith and credit of the United States).

"to condemn various forms of property," in order to build and acquire ships for use by the United States in World War I and to dispose of them afterwards. *Sloan Shipyards*, 258 U.S. at 570, 566. Nonetheless, the Court held that the instrumentality was not the United States for purposes of a bankruptcy statute that gave priority to claims of the "United States," nor for purposes of a statute granting the Court of Claims jurisdiction over damage actions against the "United States." *Id.* at 569-570.

Similarly, the Court held that an officer of that instrumentality was not an "officer or agent of the United States" for purposes of a federal criminal statute. *See Strang*, 254 U.S. at 493. And even when the Court held that that instrumentality was entitled to discount telegraph rates under a statute granting discounts to a "department[] of the government of the United States," the Court explained that its holding was not based on the fact that the entity was "an instrumentality of the government, but because it is a department of the United States within the meaning of the Post Roads Act." *Western Union*, 275 U.S. at 426. Confirming the contextual nature of the inquiry, the Court specifically noted that other entities denominated instrumentalities of the United States would not be entitled to the discount rates. *See id.* at 425-426.[5]

[5] Contrary to the Postal Service's claim (USPS Br. 20, 29), the court of appeals' determination that the Postal Service is a "Federal agency" for purposes of 28 U.S.C. § 1491(b)(1) (jurisdiction over challenges to bid solicitations) is not evidence of inconsistency. Such variations are to be expected given the contextual inquiry necessary in determining when an entity shares the benefits and obligations of the United States under any given statute. *Compare Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 83-86 (1941) (Reconstruction Finance Corporation was not "the United States" or its "agency" under civil procedure rule prohibiting awarding of costs because, "[w]hile it acts as a governmental agency in performing its functions, still its transactions are akin to those of private enterprises" and "the unqualified authority to sue and be sued placed [the entity] upon an equal footing with private parties as to the usual incidents of suit"), *with Cherry Cotton Mills v. United States*, 327 U.S. 536, 538-539 (1946)

(Continued on following page)

This Court's precedents thus evidence a great skepticism that agencies or instrumentalities are all generally entitled to the same privileges as the United States.[6]

3. The rationale of *Cooper* has no application to the Postal Service

The relevant inquiry, essentially unaddressed by the Postal Service, is whether the reasons for the Court's holding in *Cooper* that the United States should be deemed not a "person" under the federal antitrust laws also require a holding that the Postal Service is not a "person" under the antitrust laws. They do not.

a. The holding of *Cooper* was not based on any presumption that federal entities, or entities performing governmental functions, are not "persons" for purposes of the antitrust laws. The Court made clear that "there is no

(Reconstruction Finance Corporation was part of "the Government of the United States" under statute authorizing court to hear counterclaims in tax refund proceeding).

[6] *Sea-Land Service, Inc. v. Alaska Railroad*, 659 F.2d 243 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982), the case primarily relied upon by the Postal Service in its effort to extend *Cooper* to all agencies and instrumentalities of the United States, does not address whether *Cooper* should be so extended. It appears from then-Judge Ginsburg's opinion for the court of appeals that the plaintiffs there did not seek to establish that the instrumentality (Alaska Railroad) was distinct from the United States. Instead, those plaintiffs had urged the court of appeals to limit *Cooper* to instances where the United States acts as a plaintiff and to hold that "the United States *and* its instrumentalities" are "persons" when sued as defendants under the antitrust laws. *Id.* at 245-246 (emphasis added). The court of appeals was apparently not confronted with, and thus did not address, the argument that *Cooper* did not necessarily apply to every instrumentality of the United States. To the contrary, the court of appeals in *Sea-Land Service* distinguished an earlier decision that permitted the District of Columbia Armory Board to be sued under the antitrust laws, *id.* at 246, thus implicitly recognizing that even entities created by Congress to perform government functions do not necessarily fall within the holding of *Cooper*.

hard and fast rule of exclusion" under the antitrust statutes. *Cooper*, 312 U.S. at 604-605. Rather, the *Cooper* Court emphasized that the "scheme and structure of the legislation" plainly reflected Congress's intent that the United States, even though a "juristic person," not be able to sue for damages. *Id.* at 604, 607. That was because the Sherman Act elsewhere authorized the United States to bring criminal prosecutions and because the Act elsewhere created an express cause of action for the United States to bring suits for injunctive relief and to seize property. *Id.* at 604, 607. Only the cause of action for damages did not expressly mention the United States. *Id.* at 607-608. The Court reasoned that this decision by Congress was deliberate because earlier versions of the legislation considered by Congress had provided for a damage action for the United States. *Id.* at 612. The *Cooper* Court thus held that the structure of the Sherman Act "envisaged two classes of actions, – those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury." *Id.* at 608.[7]

The Court's subsequent cases have read *Cooper* as limited to a holding about the United States and not as evidencing any rule that independent governmental entities are exempt from the antitrust laws. In *Georgia v. Evans*, decided the Term after *Cooper*, the Court held that States are "persons" under the antitrust laws. *Evans* emphasized that "[i]t was not held [in *Cooper*] that the word 'person,' abstractly considered, could not include a governmental body." 316 U.S. at 161. Instead, the *Cooper* Court had found that "Congress did not give to the Government, in addition to the other remedies exclusively provided for it, the remedy of treble damages – the only

[7] Congress subsequently amended the Clayton Act to expressly authorize the United States to seek damages by creating a separate cause of action. *See* Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282, 282-283 (codified as amended at 15 U.S.C. § 15a).

remedy originally given to victims other than the Government of practices proscribed by the Act." *Id.* at 161-162; *accord Pfizer v. Government of India*, 434 U.S. at 316-317. As this Court explained in *Parker v. Brown*, 317 U.S. 341, 351 (1943), the *Cooper* exemption was "derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute."

b. The rationale of the Court in *Cooper* does not apply to the Postal Service. If the Postal Service is not recognized as a "person" under the antitrust laws, it will not be able to sue of its own accord under the causes of action created by those laws, whether for injunctive relief or otherwise. It will have no independent means of remedying or deterring injuries to its business or property caused by antitrust violations. The Postal Service, unlike the United States, was not granted any alternative means to vindicate its interests under the antitrust laws, such as the authority to initiate criminal prosecutions, to seek injunctive relief, or to seize property.

The United States cannot bring an antitrust suit for damages suffered by the Postal Service. The United States may sue for damages under the Clayton Act only when it is "injured in *its* business or property." 15 U.S.C. § 15a (emphasis added). The Postal Service's property is distinct from the property of the United States. *See* 39 U.S.C. § 401(6) (empowering Postal Service to construct buildings on "any property owned * * * by it"); *see also id.* § 2005(b) (discussing "the assets of the Postal Service"). Thus, injuries to the Postal Service's property and business do not fall within the United States' right of action for damages under the Clayton Act. *See United States v. General Elec. Co.*, 209 F. Supp. 197, 204-207 (E.D. Pa. 1962) (so holding for Tennessee Valley Authority).

Indeed, the Postal Service has on an earlier occasion recognized that, when the United States brings suit under the federal antitrust laws, the Postal Service is not part of

the United States. In *United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978), the United States sued AT&T under Section 4 of the Sherman Act. AT&T then sought to discover documents in the possession of the Postal Service pursuant to Federal Rule of Civil Procedure 34, which governs production of documents by a "party." The Postal Service argued that it could be compelled to produce documents only through a subpoena issued pursuant to Rule 45, because it was "not a party to the action" – *i.e.*, not the "United States" – as required by Rule 34(c). *See* 461 F. Supp. at 1330 n.49, 1332 n.52. The district court agreed with the Postal Service, holding that the independence of the Postal Service from the rest of the government made it inappropriate to treat the Postal Service as the "United States" under the antitrust laws. *See id.* at 1335-1336 & n.65. Therefore, the rationale of *Cooper* for exempting the United States from the word "person" – because it could bring suit under other provisions of the antitrust laws – does not apply to the Postal Service and should be rejected as the basis for extending that exemption.

B. Congress Reorganized The Postal Service To Be An "Independent Establishment" Treated Like Other Market Participants And Not As The United States

1. The text and structure of the federal legislation governing the Postal Service demonstrate that Congress intended the Postal Service to be both independent and distinct from the United States

a. Despite the Postal Service's repeated invocation of the phrase "agency or instrumentality," *see* page 9, *supra*, Congress has not designated the Postal Service either an "agency" or an "instrumentality" of the United States. Congress expressly reorganized the Postal Service in 1970 as an "independent establishment of the executive branch." 39 U.S.C. § 201. The selection of those words by Congress has significance. The Office of Legal Counsel of the United States Department of Justice has explained,

with regard to a different statutory entity, that "[t]he term 'establishment' embodies the idea of a free-standing entity with its own structure and unity." Op. Off. Legal Counsel, 2000 OLC LEXIS 17, at *20 (May 11, 2000).[8]

The independent and free-standing nature of the Postal Service is intentional. Prior to the Postal Reorganization Act of 1970, postal matters were the responsibility of the Post Office Department. Congress removed the Postal Service from its prior status as a cabinet-level department of the Executive Branch in order to give it more independence – independence from politics and independence to manage its operations in "a business-like way." H.R. Rep. No. 91-1104, at 11 (1970); *see id.* at 12 ("the Postmaster General's presence in the President's Cabinet creates a link between partisan politics and the Postal Service"); S. Rep. No. 91-912, at 2 (1970) (Postal Service to have "unfettered authority and freedom * * * to maintain and operate an efficient service").

[8] Congress appears to have denominated only 16 other entities "independent establishments," and the Postal Service is the only independent establishment for which Congress has expressly waived sovereign immunity for damages. *See* 5 U.S.C. § 1101 (Office of Personnel Management); 15 U.S.C. § 2411 (National Center for Productivity and Quality of Working Life); 20 U.S.C. § 2004 (Harry S. Truman Scholarship Foundation); 20 U.S.C. § 4502 (James Madison Memorial Fellowship Foundation); 20 U.S.C. § 4703 (Barry Goldwater Scholarship and Excellence in Education Foundation); 20 U.S.C. § 5702 (Christopher Columbus Fellowship Foundation); 22 U.S.C. § 2452 note (Vietnam Education Foundation); 24 U.S.C. § 411 (The Armed Forces Retirement Home); 36 U.S.C. § 2301 (The United States Holocaust Memorial Museum); 39 U.S.C. § 3601 (Postal Rate Commission); 42 U.S.C. § 2286 (Defense Nuclear Facilities Safety Board); 42 U.S.C. § 10242 (Office of the Nuclear Waste Negotiator); 42 U.S.C. § 10262 (Nuclear Waste Technical Review Board); 42 U.S.C. § 11311 (Interagency Council on the Homeless); 44 U.S.C. § 2102 (National Archives and Records Administration); 49 U.S.C. § 1111 (The National Transportation Safety Board). *Compare* USPS Br. 20 n.6 (listing numerous "instrumentalities or agencies" with sue-and-be-sued clauses, but no "independent establishments" with such a clause).

Since 1970, the Postal Service has not been subject to the general supervision of the President. *See National Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810, 822 (1983) (the Act "remov[ed] the Postal Service's principal officers from the President's direct control"). The Postmaster General is not appointed by the President and cannot be removed by him. *See* 39 U.S.C. § 202(c). Nor is the Postal Service's litigation or settlement of claims subject to the control of the Attorney General. *See* 39 U.S.C. §§ 401(8), 409(d), 2008(c); *see also Mail Order Ass'n of Am. v. USPS*, 986 F.2d 509 (D.C. Cir. 1993) (holding that Postal Service can continue litigating its case despite directives to the Board of Governors from the Department of Justice and the President to dismiss the suit); 3 Op. Off. Legal Counsel 253, 256 (1979) ("The peculiar status of the Postal Service exempting it to a large extent from Presidential control and from a substantial range of laws normally applicable to executive establishments necessarily has an impact on the control exercised by the Attorney General over postal litigation * * * .").

The Postal Service is not "within the executive branch of the Government as that term is commonly understood." *Id.* at 255; *accord* 1 Op. Off. Legal Counsel 79, 83 (1977) (Postal Service "has a degree of independence from the executive branch"). "[B]oth the Act and its history reveal that Congress intended to grant the Service at least some measure of insulation from control by the President and to place the Service in a separate category from the conventional executive departments." 5 Op. Off. Legal Counsel 239, 241 (1981). To hold that the Postal Service is nonetheless the equivalent of the United States, as the Postal Service now urges, defies congressional intent.

b. Combined with Congress's designation of the Postal Service as an "independent establishment," other features of the statutory scheme governing the Postal Service demonstrate that it is not equivalent to the United States for purposes of the antitrust laws. The structure of the Postal Reorganization Act illustrates that Congress intended to create a distinct legal person that presumptively is not subject to the laws that are usually applicable

to the federal government. *See* 39 U.S.C. § 410(a) ("Except as provided by subsection (b) of this section * * * no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.").

When Congress wanted the Postal Service to be treated the same as the United States, it expressly so provided. *See, e.g.*, 39 U.S.C. § 401(9) (authorizing Postal Service to "have the priority of the United States with respect to payment of debts out of bankrupt * * * estates"), § 409(b) (providing that procedural provisions governing suits "in which the United States, its officers, or employees are parties * * * shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties"). If the Postal Service were correct that it was automatically to be treated as if it were the United States, then Congress's careful identification of such particular instances in which the Postal Service is to have the priority or other privilege of the United States would have been unnecessary and redundant. Congress's inclusion of those explicit provisions confirms that Congress did *not* intend the Postal Service automatically to share all the privileges to which the United States is entitled. In such circumstances, Congress's failure to provide that the Postal Service shares the United States' exemption from the antitrust laws is significant.

The Postal Service points to several provisions that, it argues (USPS Br. 13-16), reflect the "governmental character" of the Postal Service. But the question is not whether the Postal Service is, in some ways, a governmental body. As we discuss above, *see* pages 7-8, *supra*, governmental bodies generally are "persons" subject to the antitrust laws. And none of the specific grants of authority relied upon by the Postal Service provides any support for its argument that Congress intended the Postal Service to fall within the exemption from the antitrust laws for the United States described in *Cooper*. For example, the power of eminent domain (USPS Br. 15) does not convert an

instrumentality of the United States, let alone an independent establishment, into the United States. *Cf. Sloan Shipyards Corp.*, 258 U.S. at 567, 570 (holding that instrumentality of the United States with power of condemnation is not the United States for purposes of bankruptcy code). Nor does it immunize a person from the antitrust laws. *Cf. United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 332 (1897) (rejecting arguments of railroad companies that they are exempt from the Sherman Act because, *inter alia*, they are "public corporations * * * granted valuable franchises and privileges, among which the right to take the private property of the citizen in invitum is not the least").[9]

c. Finally, Congress's intent that the Postal Service not be treated as the United States for purposes of the antitrust laws is strikingly reflected in the authorization of the Postal Service to "sue and be sued in its official name." 39 U.S.C. § 401(1). As the Postal Service concedes (USPS Br. 17), that provision constitutes a waiver of its

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[9] Several of the provisions relied upon by the Postal Service reveal Congress's intent to distinguish between the Postal Service and the classic cabinet-level departments of the Executive Branch. For example, the Postal Service asserts (USPS Br. 15) that it may borrow on the full faith and credit of the United States. But in fact the statute authorizes it only to issue bonds on its own behalf, pledging its own assets and revenues as collateral. *See* 39 U.S.C. § 2005(b). If the Postal Service wants its bonds to be "obligations of the Government of the United States," entitled to "the full faith and credit of the Government of the United States," the Postal Service must first make a request to the Secretary of Treasury, who may so authorize "in his discretion" if he "determines that it would be in the public interest to do so." 39 U.S.C. § 2006(c). The Secretary of Treasury has never done so. *See H.R. 22, The Postal Modernization Act of 1999: Hearings Before the Subcomm. on the Postal Serv. of the House Comm. on Gov't Reform*, 106th Cong. 563 (1999) (Department of Treasury statement). Similar limits have been placed on the Postal Service's role in international conventions related to postal matters. *See* 39 U.S.C. § 407 (allowing Postal Service to negotiate postal conventions, but only consistent with the policy formulated and overseen by the Secretary of State).

sovereign immunity to damage actions.[10] But the "sue and be sued" clause in the Postal Reorganization Act does more than simply waive immunity. It also establishes that Congress intended the Postal Service to be legally distinct from the United States with its own, independent interests. As this Court has explained, the inclusion of the sue-and-be-sued clause in the Postal Service's organizational statute reflects Congress's intent that the Postal Service be "amenable to judicial process" just as "a private enterprise under like circumstances." *Loeffler v. Frank*, 486 U.S. 549, 555 (1988); *see also Franchise Tax Bd. v. USPS*, 467 U.S. 512, 520 (1984) (Court "must presume that the [Postal] Service's liability is the same as that of any other business"). Thus, the sue-and-be-sued clause is another clear indication that Congress did not intend this "independent establishment" to be entitled to the United States' exemption from the antitrust laws.

2. Congress did not intend to give the Postal Service the competitive advantage that would result from an antitrust exemption

Section 4 of the Clayton Act provides an avenue for relief against the Postal Service for violation of the federal antitrust laws when it participates in competitive markets.

In the Postal Reorganization Act of 1970, Congress instructed the Postal Service to raise funds to support itself, *see* 39 U.S.C. § 3621, and thus, in this regard, to "be run more like a business" than its predecessors. *Franchise*

[10] Assuming the Postal Service otherwise would have been entitled to the United States' sovereign immunity from suit, the sue-and-be-sued provision resolves the necessary "first inquiry" of "whether there has been a waiver of sovereign immunity," *FDIC v. Meyer*, 510 U.S. 471, 484 (1994), thus permitting the Court to address the "second inquiry" – and the sole question raised by petitioner before this Court – whether Section 4 of the Clayton Act "provides an avenue for relief" against the Postal Service. *Ibid.*

Tax Bd., 467 U.S. at 520; *cf.* 39 U.S.C. § 2009 (annual budget "shall be a business-type budget"). The Postal Service interprets the Postal Reorganization Act to empower it to market a wide range of products and services in order to raise revenues. The Postal Service concedes (USPS Br. 27) that it has entered into direct competition with private enterprise in the carrying of parcels and packages. *See Global Mail Ltd. v. USPS*, 142 F.3d 208, 215 (4th Cir. 1998) (Postal Service "is not an enterprise that occasionally affects commercial firms indirectly in its endeavors" but competes "head-to-head with a host of private courier services").

There is nothing in the text or structure of the statute creating the Postal Service that reflects an intent by Congress that, as the Postal Service enters competitive markets, it should not be held to the same antitrust standards as other market participants in order to ensure market efficiency and protect consumer welfare.[11] This is particularly true in light of Congress's determination to rely on competition in the marketplace to efficiently price and allocate services for the transportation of cargo. *See, e.g.*, S. Rep. No. 104-176, at 10 (1995) (Congress enacted the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, to abolish the Interstate Commerce Commission because "competition disciplines rates far better than tariff filing and regulatory intervention"); H.R. Conf. Rep. No. 103-677, at 88 (1994) (Congress enacted Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1606, which preempts state laws related to a "price, route, or service" of cargo carriers, so that "[s]ervice options will be dictated by the marketplace; and not by

[11] Although there may be alternative remedies available to respondents in this particular case relating to contracting claims (USPS Br. 31-33), the scope of the anticompetitive conduct in which the Postal Service could engage far exceeds the scope of the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*

an artificial regulatory structure"). Allowing the Postal Service to evade liability for anticompetitive or monopolistic conduct would threaten the operation of the competitive market for services related to the transportation of cargo that Congress intended to foster.

The competitive markets in which the Postal Service operates are not limited to delivery services. The Postal Service sells services such as electronic bill payment and other fund transfers as well. *See* General Accounting Office, *U.S. Postal Service: Update on E-Commerce Activities and Privacy Protections* 44 (2001). The Postal Service also sells telephone calling cards and retail merchandise, such as children's toys, greeting cards, and packaging products, both on-line and at post offices. *See* General Accounting Office, *U.S. Postal Service: Development and Inventory of New Products* 40, 46 (1998). These products and services directly compete with offerings by private persons in the relevant markets.

The Postal Service has announced that it intends to offer "new products and services" in new markets. General Accounting Office, *Major Management Challenges and Program Risks: U.S. Postal Service* 19 (2001). Such expansion will bring the Postal Service into competition with additional private industries. *See ibid.* (Postal Service will "face both traditional competitors in the delivery service sector, such as FedEx and United Parcel Service (UPS); and a broad range of competitors, such as technology companies, financial institutions, and foreign postal administrations."). The Postal Service also works closely with private companies. *See id.* at 35. Such expansion increases the risk of anticompetitive behavior. *See id.* at 34-35.

In comparable circumstances, it has been recognized that permitting the Postal Service alone to be exempt from regulation would create an uneven playing field for competitors. The Federal Communications Commission (FCC) determined that the Postal Service is a "person" subject to its regulation under the Communications Act of 1934, currently codified at 47 U.S.C. § 153(32), because the Postal Service "is a proprietary enterprise which, like

other government-owned entities that have been found subject to regulation, has been organized in a form similar to a commercial venture." *In re Graphnet Sys., Inc.*, 73 F.C.C.2d 283, 297 ¶ 38 (1979), *vacated as moot sub nom. USPS v. FCC*, No. 79-2243 (D.C. Cir. Oct. 14, 1980). The FCC concluded that supervision of the Postal Service was necessary to prevent the Postal Service from an unintended advantage in a competitive area. *See id.* at 296 ¶¶ 34-36, 297 ¶ 38. That rationale applies with equal force under the antitrust laws.

3. The United States has recognized that the statutory text and structure demonstrate that the Postal Service is subject to the antitrust laws

The FCC's assessment of the nature of the Postal Service is consistent with the views expressed by the United States Department of Justice. In 1978, the Department of Justice concluded that, despite the "technical[ ]" designation as an "independent establishment," "[a]t present, the U.S. Postal Service is essentially a Government corporation engaged in utility-like operations – the physical delivery and handling of documents and packages." Comments of the U.S. Department of Justice at 22, Postal Rate Comm'n Docket No. MC78-3 (Dec. 6, 1978).[12] It further concluded that, "while the point is by no means unarguable, neither the case law nor sound public policy would indicate that the Postal Service enjoys any comprehensive 'sovereign immunity' from the antitrust laws." *Id.* at 34.

In reaching the conclusion that the Postal Service is not exempt from the antitrust laws, the Department of Justice relied upon four factors. First, "as the Postal

[12] This document was filed by the Department of Justice with the Postal Rate Commission in response to a request for the submission of legal memoranda on the question, *inter alia*: "Is the [Postal] Service subject to the antitrust laws?" Cmts. of Dep't of Justice, *supra*, at 21.

Service itself has argued, its status is different from that of other Federal agencies." *Id.* at 29 (citing *United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978)). Second, the "'sue and be sued' power conferred upon" the Postal Service reflects that the "Postal Service is 'business-like' in its operations." *Id.* at 30 (citing *Goodman's Furniture Co. v. USPS*, 561 F.2d 462, 464-465 (3d Cir. 1977)). Third, the "Postal Service does not now have, nor has it enjoyed in the past, any comprehensive statutory monopoly over the delivery of mail," and while it "does enjoy some limited monopoly over the delivery of 1st class and other 'letter' mail, a wide variety of alternative document delivery services are generally available." *Id.* at 30-31. Hence, "although the Postal Service remains a government 'establishment,' many of its service offerings are very similar to services offered by private firms." *Id.* at 30. And fourth, Congress "grant[ed] the Postal Service management very broad authority and considerable operational discretion" outside its limited monopoly and there is no reason why "even a lawful monopolist" should be exempt from "antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *Id.* at 31-32 (quoting *City of Lafayette*, 435 U.S. at 417).

The Department of Justice's view appears to have remained constant. As we discuss below, the Department of Justice (along with the Board of Governors of the Postal Service) supports legislative proposals that would expressly confirm that the antitrust laws apply to the Postal Service. *See* pages 26-27, *infra*.

C. Application Of The Federal Antitrust Laws To The Postal Service Is Not Precluded By Its Limited Statutory Monopoly Or The Remedies Available Under The Antitrust Laws

There is nothing in the text of the Postal Reorganization Act of 1970 that expressly precludes the Postal Service from being subject to the antitrust laws. The Postal

Service nonetheless contends (USPS Br. 26-33) that certain aspects of its organization and functions make it inappropriate to apply the antitrust laws to any aspect of its conduct in the marketplace. Such a complete exemption is disfavored. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399 (1978). It is also unwarranted in this situation.

1. The Postal Service contends (USPS Br. 28-29) that applying the antitrust laws to it would be unworkable because some of its conduct is mandated by federal law granting it a monopoly to provide particular services in a particular manner. But the fact that *some* aspects of its conduct are mandated by federal law does not preclude application of the federal antitrust laws to conduct which is not so mandated. *See* 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 244b, 244f (2d ed. 2000); *City of Lafayette*, 435 U.S. at 417 (plurality) ("even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization").

This Court has regularly concluded that even entities that are subject to federal regulation that requires or expressly authorizes conduct that would otherwise violate the antitrust laws are still subject to the antitrust laws. Instead of conferring a categorical exemption, the Court has held that the antitrust laws will give way "to make [the regulatory law] work, and even then only to the minimum extent necessary." *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 389 (1981); *see* 1A Areeda & Hovenkamp, *supra*, ¶ 243e. The Court has adopted a similar standard in determining when antitrust laws will give way to authorization by a state law or state regulatory body. *See* 1A Areeda & Hovenkamp, ¶¶ 243e4, 248 (noting similarities between standards); *id.* ¶¶ 221-222 (discussing holdings of *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny regarding when authorization and supervision by state sovereign provides a defense for state agencies, municipalities, and private

persons sued under antitrust laws). In neither situation has a lawful mandate to engage in some monopolistic activity been the basis for a person's complete exemption from the antitrust laws.[13]

There is no inherent tension between the Postal Service's lawful monopoly over the delivery of letter mail pursuant to the Private Express Statutes, 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601-606, and its coverage under the antitrust laws for its competitive services, such as the delivery of packages or the sale of packing supplies. As discussed above, *see* pages 21-22, *supra*, the Postal Service participates in many markets in which it holds no lawful monopoly and competes against private entities.

2. In June 2002, the Postal Service itself endorsed a legislative proposal that would have expressly confirmed that the Postal Service is subject to the Sherman and Clayton Acts for its competitive activities. *See Postal Service Board of Governors Announces Support For Postal Reform Legislation*, U.S. Postal Service Press Release No. 02-048 (June 4, 2002) (announcing that "this Board supports the bill" sponsored by Reps. McHugh and Burton); H.R. 4970, 107th Cong. § 304(a) (2002) (postal reform bill sponsored by Reps. McHugh and Burton that, *inter alia*, provided that the Postal Service "shall be considered a person" for purposes of "the antitrust laws" when it "engages in conduct with respect to any product which is not reserved to the United States under section 1696 of title 18"). This proposal does not demonstrate that the Postal Service is not currently subject to the antitrust laws. As Congress was informed when considering an earlier version of the bill, although "there is compelling legal precedent to support the proposition that the Postal Service is already subject to the antitrust laws," the bill's

[13] The proper scope of any exemption that may be available for particular conduct is outside the scope of the question presented, which focuses only on whether the Postal Service is *ever* "amenable to suit under the antitrust laws." USPS Pet. i.

provision would fill the "chasm between legal reality, on the one hand, and the perception, myth and conduct of the Postal Service, on the other." *H.R. 3717, The Postal Reform Act of 1996: Hearings Before the Subcomm. on the Postal Serv. of the House Comm. on Gov't Reform*, 104th Cong., 912 (1996) (statement of the Air Courier Conference of America).

The Department of Justice has likewise expressed support for this provision, which it views as "clarify[ing]" existing law. *See* Letter from L. Anthony Sutin, Acting Assistant Att'y Gen. for Legislative Affairs, to Rep. John M. McHugh, at 2 (Aug. 5, 1998) ("we would support legislation that clarified the application of the Federal antitrust laws to activities of the USPS falling outside of the statutory monopoly"). The Department's Antitrust Division similarly supported the legislation. *See H.R. 22, The Postal Modernization Act of 1999: Hearings Before the Subcomm. on the Postal Serv. of the House Comm. on Gov't Reform*, 106th Cong. 314-315, 323 (1999). Thus, both the Postal Service and the Department of Justice acknowledge, outside of this litigation, that antitrust coverage is not inherently incompatible with the Postal Service's limited statutory monopoly.

3. The Postal Service also suggests (USPS Br. 28) that antitrust scrutiny is not needed because the political process will ensure that it is acting in the public interest. But Congress "did not leave this fundamental national policy [reflected in the antitrust laws] to the vagaries of the political process," establishing instead "a broad policy, to be administered by neutral courts." *City of Lafayette*, 435 U.S. at 406. In any event, as discussed above, Congress restructured the Postal Service in 1970 precisely to minimize oversight or control by the politically-accountable branches of government. *See also* S. Rep. No. 91-912, at 4 (1970) (Board of Governors will be "independent of ordinary legislative and executive supervision and control"); 116 Cong. Rec. 19,848 (1970) (Rep. Gross) (Postal Service is "completely and effectively remove[d] * * * from

any possible control by the people or the people's elected representatives"). Furthermore, this Court has previously rejected claims that government entities should be immune from the antitrust laws because they can be presumed to act in the public interest. *See City of Lafayette*, 435 U.S. at 403. The Court has held that competition by government entities may be "more invidious" than from private competitors because such entities can rely on public subsidies to undercut their competitors. *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 158 n.17 (1983).

4. The Postal Service also suggests (USPS Br. 26-27) that the treble-damage remedy available under Section 4 of the Clayton Act indicates that Congress intended to exclude it from the antitrust laws. The same remedy is available under the Lanham Act for false and deceptive advertising, another form of misconduct that interferes with competition in the market. *See* 15 U.S.C. §§ 1125(a), 1117(a). Yet the Postal Service does not dispute (USPS Pet. Reply Br. 7) the unbroken holdings of the courts of appeals that the Postal Service is subject to private suit under that statute.

This Court has repeatedly held that the awarding of treble damages under the antitrust laws serves compensatory and deterrent purposes and is not inherently punitive. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635-636 (1985); *see also Cook County v. United States ex rel. Chandler*, 123 S. Ct. 1239, 1247 (2003) ("[t]reble damages certainly does not equate with classic punitive damages"). The Postal Service gives no reason why the potential availability of that remedy is a basis to exempt it from the antitrust laws' substantive standards. This Court has held to the contrary, reasoning that it may be possible to read the antitrust laws to distinguish between coverage and remedy in certain situations. *See City of Lafayette*, 435 U.S. at 401-402 (the conclusion that a city is a "person" does "not necessarily require the conclusion that remedies appropriate to

redress violations by private corporations would be equally appropriate for municipalities");[14] *Cook County*, 123 S. Ct. at 1247 (noting that unavailability of certain remedies (*e.g.*, imprisonment) against certain entities does not warrant excluding those entities from a statute's coverage entirely).

Finally, when the Antitrust Division of the Department of Justice testified in favor of the legislation, discussed above, that would confirm that the Postal Service is subject to the antitrust laws, it made clear that the cost of being subject to antitrust litigation "is a concern of all firms to which the antitrust laws apply." *H.R. 22 Hearings, supra*, at 332. The Division explained that such a concern would be dispositive "only if there is a demonstrable policy justification for shielding the USPS non-monopoly activities from antitrust scrutiny," and declared that, "[a]s a general rule, [it] disfavor[s] exemptions or protections that set one class of competitors apart from others under the law." *Id.* at 332-333.

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[14] The Court's determination that the potential availability of treble-damages does not limit the scope of the antitrust laws' coverage was consistent with the views of the United States in that case. *See* Brief for the United States as *Amicus Curiae* at 12 n.13, *City of Lafayette v. Louisiana Power & Light Co.* (No. 76-864) ("Any decision concerning the proper extent of damages liability should take place after the scope of antitrust coverage has been determined, for only then could the potential effects of damages awards upon municipalities and their officials be assessed accurately.").

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND AMERICANS FOR TAX REFORM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States Postal Service is amenable to suit as a "person" under federal antitrust laws when it engages in commercial activities outside the scope of its limited statutory monopoly where Congress has previously passed reform legislation authorizing the Postal Service to "sue and be sued."

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INTEREST OF *AMICI CURIAE*[1]

The Washington Legal Foundation ("WLF") is a national, nonprofit public interest law and policy center that advocates free enterprise principles and government accountability. WLF is particularly interested in the regulation and proper operation of the U.S. Postal Service, having participated in relevant proceedings before the Postal Rate Commission, the President's Commission on the U.S. Postal Service, and the Federal Trade Commission.

The Allied Educational Foundation ("AEF") is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has regularly appeared as amicus curiae in this Court.

Americans for Tax Reform ("ATR") is a national, nonprofit and nonpartisan coalition of taxpayers and taxpayer groups who oppose all federal and state tax increases. As a free market, taxpayer advocacy organization, ATR believes consumers of mail service are better served by a market open to competition than by a government monopoly.

Amici are strongly opposed to the abuse of the Postal Service's governmental status for the purpose of employing unfair, anti-competitive practices in its non-monopoly business. They believe that the Postal Service should be subject to the antitrust laws with respect to their commercial operations as Congress intended.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, its members, and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

With the passage of the Postal Reorganization Act of 1970, Congress ushered out the old Post Office Department and transformed it into the United States Postal Service ("USPS"). In the process, USPS emerged as a competitor in the mail delivery business having the same "liability . . . as that of any other business." *Loeffler* v. *Frank*, 486 U.S. 549, 556 (1988).

While the new Postal Service continues to serve certain public purposes and be subject to certain governmental reins, it no longer retains the "sovereign" character it used to have. When Congress launched USPS into the commercial world and "'endow[ed] it with authority to "sue and be sued," that agency [became no] less amenable to judicial process than a private enterprise under like circumstances would be.'" *FDIC* v. *Meyer*, 510 U.S. 471, 481 (1994) (citing *FHA* v. *Burr*, 309 U.S. 242, 245 (1940)) (emphasis omitted).

This comprehensive waiver of sovereign immunity fit perfectly, indeed essentially, with the Congressional objective of making USPS run more like a business, and be accountable for its successes and failures in the marketplace. Complying with the laws of competition is, of course, a key component of business accountability, and the Sherman Act establishes the principal standards of fair competition.

If Congress had truly intended to catapult this new economic behemoth into the marketplace absent any accountability under the Sherman Act, it could easily have done so in at least two obvious ways. It could have qualified USPS's sue-and-be-sued-clause, located at 39 U.S.C. § 401(1). Alternatively, it could have simply preserved the old Post Office's blanket antitrust immunity in an express statutory provision, like those found in 39 U.S.C. § 410, that specifically govern application of certain "government" laws to the Postal Service.

Both the Congressional record and this Court's precedents plainly demonstrate that the Ninth Circuit was correct in declining to narrow the broad scope of Congress's waiver of sovereign immunity. The Ninth Circuit was similarly correct in explaining that USPS's residual sovereign character can be sufficiently respected by allowing it to argue that specific activities remain immune if they are related directly to the statutory monopoly to deliver the mail. Because courts have considerable experience differentiating sovereign activities from commercial ones, such a distinction is both practical and consistent with intent of the Postal Reorganization Act.

Thus, the Ninth Circuit decision should be affirmed in order to carry out the reforms enacted by Congress, protect private sector competition from this economic leviathan it has introduced into the market, and preserve the governmental interest by perpetuating immunity for specific conduct in appropriate cases.

ARGUMENT

I. THE EVOLUTION OF THE POSTAL SERVICE HAS BROUGHT IT CLEARLY WITHIN THE ORIGINAL MEANING OF THE SHERMAN ACT.

A. Waiver of Sovereign Immunity and *FDIC* v. *Meyer*.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). This Court has outlined a two-step inquiry for use in determining whether a federal entity enjoys immunity in a particular area of the law. *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). The first step involves determining whether there has been a "waiver of sovereign immunity." *Id.* If such a waiver is found, then the court must analyze whether "the source of substantive law upon which the claimant relies provides an avenue for relief." *Id.*

Sovereign immunity is not an inviolate principle admitting of only rare and narrowly-tailored exceptions. To the contrary, this Court has previously held that "waivers by Congress of governmental immunity . . . of federal instrumentalities should be liberally construed." *FHA* v. *Burr*, 309 U.S. 242, 245 (1940). Clear and direct waivers, such as the sue-and-be-sued clause located in the Postal Reorganization Act of 1970, demonstrate "the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned." *Id.* Further, "when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." *Id.*

In that vein, this Court has found that Congress subjected USPS to a broad, not narrow waiver of sovereign immunity. It has held that 401(1) constitutes a general waiver of the Postal Service's sovereign immunity, *Loeffler* v. *Frank*, 486 U.S. 549, 554-56 (1988), thus satisfying the first requirement of *Meyer*. See generally *Davric Marine Corp.* v. *USPS*, 238 F.3d 58, 61 (1st Cir. 2001); *Global Mail Ltd.* v. *USPS*, 142 F.3d 208, 210 (4th Cir. 1998); *United States* v. *Q Int'l Courier, Inc.*, 131 F.3d 770, 775 (8th Cir. 1997).

The second step of Meyer involves determining "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Meyer*, 510 U.S. at 484. Here, the applicable law is the Sherman Act, which prohibits "*[e]very* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (emphasis added). These prohibitions apply to any "person," which the Act defines as "corporations and associations existing under or authorized by the laws of . . . the United States." *Id.* § 7.

When the Sherman Act was passed, the United States did not routinely engage as a market-participant as it does now

through numerous nontraditional, or hybrid, entities such as USPS. Thomas R. La Greca, Comment, *The Federal Government's Antitrust Immunity—Trade As I Say, Not As I Do*, 56 St. John's L. Rev 515, 532 (1982). This Court, however, has not hesitated to apply the Sherman Act when the government does participate significantly in private sector activities. See, *e.g.*, *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

Petitioner's brief leads with a citation to *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-06 (1941), in which this Court held "that Congress did not intend the statutory term 'person' as used in the antitrust laws to include the United States." Br. for Pet. at 6. While *Cooper Corp.* indeed held that the United States was not a "person" for purposes of the Sherman Act, this holding is not dispositive of this case. After all, it is precisely the personality of USPS that is at issue here.

If this Court concludes that USPS is indistinguishable in all circumstances from the United States *qua* sovereign, then USPS's claim of blanket, status-based immunity must be vindicated. If, however, this Court accepts the view that Congress intended to give USPS a non-sovereign side to its personality (i.e., outside the context of delivering first class and international mail), then *Cooper Corp.*'s methodology, including the observation that there is "no hard and fast rule of exclusion," becomes more relevant than its ultimate holding. *Cooper Corp.*, 312 U.S. at 604-05.

In *Cooper Corp.*, this Court held that a determination of immunity entails review of a number of factors, including "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute." *Id.* at 605. Thus, in the absence of such a "hard and fast rule of exclusion," the Court must undertake a case-by-case analysis, examining whether the word "person" embraces the governmental entity in question or not. *Id.* at 604-05.

Citing the current version of the Lanham Act, 15 U.S.C. § 1127, Petitioner asserts that whenever Congress has intended the definition of "person" to embrace government entities, "it has expressly so provided." Br. for Pet. at 9. This, however, is not so. The Lanham Act language cited by Petitioner merely ratified existing judicial interpretations of Congressional intent. Also, as this Court plainly stated, "there is no hard and fast rule" for determining whether an entity enjoys status-based immunity under the Sherman Act. *Cooper Corp.*, 312 U.S. at 604-05. Because Congress did not expressly immunize USPS from antitrust liability, this Court must consider the *Cooper Corp.* factors to judge whether the Postal Service is a "person" under the Sherman Act.

At its base, this case simply entails determining whether USPS, when participating in for-profit market activities that are outside the scope of its limited statutory monopoly, should be permitted to violate antitrust laws to gain competitive advantage. Applying the *Cooper Corp.* factors to USPS, as the remainder of this brief will now do, reveals that it may not do so because it is a "person" within the meaning of the Sherman Act.

B. The Postal Reorganization Act of 1970.

The United States Postal Department originally began as a fully sovereign entity, not unlike the military or the Library of Congress. But much has changed since 1775, when "[Benjamin] Franklin was named the first Postmaster General by the Continental Congress." *USPS* v. *Council of Greenburgh Civic Assocs.*, 453 U.S. 114, 121 (1981). By the mid-1960's, Congress became concerned with the Postal Department's ponderous size, inefficiencies, and mounting debt, and spent considerable time discussing methods to remedy the problem.[2] After extensive debate, Congress

[2] Senator McGee cited a former Postmaster General as saying: "It doesn't make a damn bit of difference to me whether Congress enacts a rate increase or not. I can get all the money I need out of the Treasury." 116 Cong. Rec. 21709 (1970) (Statement of Sen. McGee).

passed the Postal Reorganization Act of 1970 ("PRA"), Pub. L. No. 91-375, 84 Stat. 719 (codified as amended in Title 39 of the United States Code), which reorganized the Department "as an independent establishment in the executive branch and purposely insulated [it] from direct control by the President, the Office of Management and Budget, and the Congress." Statement of President Gerald Ford, 116 Cong. Rec. 27599 (Aug. 6, 1970). In essence, Congress "wished to make the delivery of the mail a self-supporting enterprise." *Standard Oil Div.* v. *Starks*, 528 F.2d 201, 202 (7th Cir. 1975).

The PRA preserved a limited statutory monopoly for the USPS over the delivery of first class and international mail, and provided USPS with the opportunity to compete in the private sector for goods and services. See 39 U.S.C. § 401, *et seq.* See also *Air Courier Conf. of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 519 (1991) (recognizing that Congress conferred a limited legal monopoly on the Postal Service for mail delivery in and from the United States).

The PRA also provided "the authority to operate the postal service efficiently and economically, with freedom of financing, choice of modes of transportation, opportunities for modernization and for variations in service to meet changing needs." 116 Cong. Rec. 19844 (1970) (Statement of Rep. Dulski). This Court has recognized that, on numerous occasions, Congress has "indicated that it wished the Postal Service to be run more like a business than had its predecessor." *Franchise Tax Bd.* v. *USPS*, 467 U.S. 512, 519-20 (1984). As Senator Boggs stated succinctly, "With the enactment of this legislation, Congress will take steps to get out of the postal business." 116 Cong. Rec. 26958 (1970) (Statement of Sen. Boggs).

Competition in the private sector entails legal, as well as economic, accountability. Thus, Congress provided USPS a two-edged sword: the ability both to "sue and be sued." 39 U.S.C. § 401(1). Congress surely recognized that, as an economic leviathan, USPS's activities would inevitably implicate antitrust laws. Yet, Congress chose not to exempt USPS from antitrust liability, but only limited USPS's amenability to private suit in two respects: (1) the applicability of the Federal Tort Claims Act, and (2) certain procedural matters relating to the conduct of suits involving a governmental entity. See *id.* § 410. "These specific and isolated limitations indicate beyond doubt that the waiver to sue and be sued applied to all other litigation." *Standard Oil*, 528 F.2d at 203. While "Congress knows well enough how to draw such statutes," and specified in great detail which "government" laws would continue to apply to USPS, it nonetheless chose not to insulate it from liability if USPS wielded its enormous market power in an anti-competitive fashion.

The notion that the new USPS shed much, if not most, of its government character is no latter-day, revisionist sentiment. In enacting the PRA, Congress specifically declared that its purpose was to authorize the operation of the postal service in "a business-like way," H.R. Rep. No. 01-1104 (1970), *reprinted at* 1970 U.S.C.C.A.N. 3649, 3660, and it attempted to make the delivery of the mail a self-supporting enterprise. See 39 U.S.C. § 2401. The Postal Service was even given authority to employ its own attorneys, which would no doubt prove essential, given the predictable tidal wave of litigation that would ensue from the USPS's "right" to sue and be sued. *Id.* § 409(d). It was thus endowed with powers commensurate with "the autonomy that the USPS was to enjoy." *Standard Oil*, 528 F.2d at 203.

By enacting the PRA, Congress also "established the Postal Service as a quasi-public entity that was to *compete on essentially level ground* with private enterprise." *Davric*, 238 F.3d at 61 (emphasis added). Accordingly, there is a

presumption that USPS "is not less amenable to judicial process than a private enterprise under like circumstances would be," *Burr*, 309 U.S. at 245, and therefore "we must presume that the Service's liability is the *same as that of any other business*." *Franchise Tax Bd.*, 467 U.S. at 521 (emphasis added). Over 100 years ago, this Court advised that a government, by "giving to the [public corporation] the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the [corporation], and waives all the privileges of that character. *Bank of the United States* v. *Planters' Bank of Georgia*, 22 U.S. (9 Wheat) 904 (1824).

While the USPS is hardly alone in being forced to defend itself against copious litigation, by stipulating that USPS may sue and be sued, Congress intentionally "launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,'" *Burr*, 309 U.S. at 245, thus "cast[ing] off the cloak of sovereignty and assum[ing] the status of a private commercial enterprise." *Library of Congress* v. *Shaw*, 478 U.S. 310, 317 n.5 (1986). Accordingly, when the old Postal Department's fully sovereign character was terminated, it thus gained "the status of a private commercial enterprise . . . fit[ting] within the common meaning of the world 'person,' just as does any other private corporation." *Flamingo Indus. (USA) Ltd.* v. *USPS*, 302 F.3d 985, 992 (9th Cir. 2003).[3]

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[3] *See also* 15 U.S.C. § 7 ("The world 'person,' or 'persons,' wherever used in [Title 15 of the United States Code] shall be deemed *to include* corporations . . . .") (emphasis added); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 782 (2000) ("[T]he presumption with regard to corporations is just the opposite of the one governing [sovereigns]: they are presumptively covered by the term 'person' . . . .") (citing 1 U.S.C. § 1) (emphasis omitted).

Just as Congress ratified USPS's amenability to suit under the Lanham Act in response to USPS's insistence on immunity, Congress is currently

C. The Sherman Act of 1890.

Although monopolies and contracts in restraint of trade were already illegal at common law in the late 1800's, several factors constrained enforcement. First, state courts had no authority to regulate states engaged in interstate commerce. William Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. Chi. L. Rev. 221, 246 (1955). Second, some argued that because there was no federal common law, federal courts could not enforce the common law's restraints on monopolies without an anti-trust statute. 21 Cong. Rec. 3152 (1890) (Statement of Sen. Hoar). Finally, contracts in restraint of trade "could only be brought before the courts by parties to them." Letwin, *supra* at 243.

The Sherman Act resolved these issues by allowing the federal courts to enforce the common law anti-monopoly rules, and by allowing third parties to challenge anti-competitive agreements that harmed their businesses. For this reason, Senator Sherman stated that the Act "does not announce a new principle of law, but applies old and well-recognized principles of common law to the complicated jurisdiction of our State and Federal Government." 21 Cong. Rec. 2456 (1890) (Statement of Sen. Sherman). It was anticipated that the Act would be applied to anti-competitive

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considering doing the same for the Sherman Act. Senate Bill 1285, the Postal Accountability and Enhancement Act of 2003, was introduced in the Senate on June 18, 2003, shortly after certiorari was granted in this case. In general, of course, pending legislation is of limited to non-existent value in construing prior legislative intent, and the same is true here. However, given Congress's track record of codifying the prior judicial interpretation that USPS was amenable to suit under the Lanham Act, and the fact that the bill was introduced shortly after certiorari in this case was granted, no inference should be drawn here other than that some in Congress may now wish to make Congressional intent explicit. *See, e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 260 (1994) (explaining that Congress expressly included amendatory language in a statute to make clear its original intent when it first adopted the statute).

agreements wherever they existed—whether privately or governmentally created.

In the course of debating the Act, Senator Sherman decried the evils of a monopoly, whether government-created or private, that "control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist." *Id.* at 2457 (Statement of Sen. Sherman). In short, the object of the Act was "to declare unlawful trusts and combinations in restraint of trade and production." *Id.* at 2456.

Senator Sherman recognized that monopolies could arise just as easily from governmental grants as they could from private contracts, and that the Act's purpose was simply to prevent their existence—in any possible form—from harming the "humble" businessman. *Id.* at 2569.

> Whether actions taken pursuant to the power of a state were to be included or excluded from Sherman Act prohibitions is never explicitly mentioned in the legislative debates. One could argue that if the legislative history reveals anything it is that the purpose of the act is to strike down arrangements which have anticompetitive effects.

Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U. L. Rev. 71, 83 (1974-75).

This plain and exceptionally broad language of the statute would seem to exclude any broad carve-out for anti-competitive behavior in the marketplace by preventing "*[e]very* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (emphasis added). Focusing on Congress's prominent use of the word "every," this Court has stated that "[l]anguage [in the federal antitrust laws] more comprehensive is difficult to conceive. On its

face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse . . . " *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), *superseded on other grounds*, *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491 (1993).

Importantly, while this Court has indeed held that the United States *qua* sovereign is exempt under the Sherman Act, see *Cooper Corp.*, 312 U.S. at 606, it has never ruled that a federal, quasi-governmental, or hybrid, entity is immune when it acts as a market participant, as USPS does.

D. *United States* v. *Trans-Missouri Freight Association.*

Shortly after passage of the Sherman Act, this Court acknowledged that governmental actors could cause, and also be liable for causing, anti-competitive harms. In *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), this Court "for the first time authoritatively declare[d] the intended scope of the provisions of the so called Anti-Trust Act of 1890." William D. Guthrie, *Constitutionality of the Sherman Anti-Trust Act of 1890,* 11 Harv. L. Rev. 80, 80 (1898). *Trans-Missouri* involved the question of whether the Sherman Act applied to a public railroad. The majority held that it did, refusing to "read[] into the act a limitation which Congress had declined or omitted to insert," and explained that "the language was plain and unlimited." *Id.* at 82.

While such a holding may seem unremarkable in our current economic environment, it is important in light of the fact that railroads in the late 1800's were generally public, not private corporations, regulated and often owned by governments. See, *e.g.*, *Swan* v. *Williams*, 2 Mich. 427 (Mich. 1852), *available at* 1852 WL 3103 (holding as constitutional the power of the Territorial Legislature of Michigan to charter the Pontiac Railroad Company). For example, just three years before *Trans-Missouri*, this Court

explained that Congress "may create corporations as appropriate means of executing the powers of government, as, for instance . . . a railroad corporation for the purpose of promoting commerce among the states." *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 529 (1894).

Hence, the Sherman Act was clearly applied with full force to the Trans-Missouri Railroad, a company with public obligations, duties, and ownership. This Court explained that because railroads were public corporations, they were given special government "privileges, among which [was] the right to take the private property of a citizen [through eminent domain] . . . donees of large tracts of public lands, and gifts of money by [governments]." *Trans-Missouri*, 166 U.S. at 332. These powers are not unlike those given to USPS by the PRA. More specifically:

> It cannot be disputed that a railroad is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things. But the very fact of the public character of a railroad would itself seem to call for special care by the legislature in regard to its conduct, so that its business should be carried on with as much reference to the proper and fair interests of the public as possible.

Id. at 322. Thus, an entity with a "public character," which engaged in commercial activity, was at least as amenable to suit for anticompetitive behavior as any private entity. After all, the Act's intent was to prevent such behavior wherever it occurred, whether by a private or public corporation, and regardless of the public character.

E. *City of Lafayette* v. *Louisiana Power & Light Co.*

Almost 80 years after holding that the Sherman Act applied to a public corporation, this Court had an opportunity specifically to address whether the Sherman Act also applied to a non-federal governmental unit. In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), this Court considered whether a municipality that acted anti-competitively would be subject to the strictures of the Sherman Act. Chief Justice Burger's opinion for the Court explained in stark terms the type of competitive damage governmental actors could perpetrate on the business markets through anti-competitive actions. He explained that Congress intended to deal "comprehensively" with such damage, even if caused by a governmental actor:

> [It is] remarkable to suggest that the same Congress which 'meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade,' would have allowed these petitioners to complain of such economic damage while baldly asserting that any similar harms [government] might unleash upon competitors or the economy are absolutely beyond the purview of federal law. To allow the defense asserted by the petitioners in this case would inject a wholly arbitrary variable into a 'fundamental national economic policy.'

Id. at 389, 419-20 (citations omitted) (citing *Carnation Co.* v. *Pacific Conf.*, 383 U.S. 213, 218 (1966)).

The Court's rationale in *City of Lafayette* applies foursquare to USPS, and provides the key to upholding the Ninth Circuit's decision below. In *City of Lafayette*, the Court warned that governmental entities, such as municipalities:

> act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.

Id. at 408. Thus, when "act[ing] as owners and providers of services," a municipality—or other governmental entity—would undoubtedly qualify as a "person" under the Sherman Act. *Id.*

This Court recognized that if a governmental entity were insulated from antitrust challenge, it could wreak non-sovereign, self-interested havoc in the market place, thereby undermining the objectives of the antitrust laws. To the extent government entities such as "municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *Id.* The concerns animating the Court's holding in *City of Lafayette* apply in spades to USPS—a massive commercial player that Congress has unleashed into the marketplace with the purpose and effect of forcing it to behave like a business.

By competing in the same arena as private businesses, USPS is properly forced to take on liability like that of the private sector, and obliged to respect the same constraints. As this Court recognized many years ago, "when a government becomes a partner in any trading company, it divests itself . . . of its sovereign character, and takes that of a private citizen . . ." *Planters' Bank*, 22 U.S. at 907. By taking on the same character as its competitors, the Postal Service is obligated to obey the rules that deny it an unfair competitive advantage.

II. AN ENTITY THAT CAN SUE AND BE SUED IS PRESUMPTIVELY LIABLE UNDER THE SHERMAN ACT.

This Court has made clear that "there can be no doubt that Congress has full power to endow [a government corporation] with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process." *Burr*, 309 U.S. at 244. Thus, the Ninth Circuit correctly stated that, in light of the sue-and-be-sued clause in the PRA, USPS's "waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." *Flamingo*, 302 F.3d at 992.

Absent express language to the contrary, an entity is presumed not to be immune from antitrust laws. This Court has repeatedly confirmed the "heavy presumption against implicit exemptions from the antitrust laws." *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 157-58 (1983) (citing *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)). See also *City of Lafayette*, 435 U.S. at 398 (holding that there is a clear "presumption against implied exclusions from coverage under the antitrust laws.") Such a presumption remains "unless it appears that the antitrust and regulatory provisions are plainly repugnant." *Id.*

Hence, a presumption exists that when a governmental-sponsored enterprise or other hybrid governmental creation acts as a market participant, it must abide by the same rules and regulations as its market competitors. As this Court said over a century ago:

> It is, we think, a sound principle, that when a government becomes a partner in any [private] company, *it divests itself . . . of its sovereign character, and takes that of a private citizen.* Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with

> whom it associates itself, and *takes the character which belongs to its associates*, and to the business which is to be transacted.

Planters' Bank, 22 U.S. at 907 (emphases added). In short, when USPS voluntarily decides to compete in the private sector, with private companies, it should not—absent specific textual language—expect to be immune from the same laws that bind its competitors.

So heavy is this presumption in favor of non-immunity, that a governmental entity may still be subject to antitrust liability even absent a sue-and-be-sued clause. This Court has consistently maintained that "[i]n the context of modern thought and practice regarding the use of corporate facilities, such a clause is not a ritualistic formula which alone can engender liability like unto indispensable words of early common law." *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939) (holding that the Regional Agricultural Credit Corporation was not immune from suit). When this Court ruled against government immunity in *Keifer*, notwithstanding the absence of a sue-and-be-sued clause, it explained that "Congress has provided for not less than forty [governmental-sponsored enterprises] . . . and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor . . ." *Id.* at 391.

If a governmental-sponsored enterprise ("GSE") may be liable even absent a sue-and-be-sued clause in its charter, then when Congress deliberately subjects an entity to liability, there is, *a fortiori*, no legal or logical basis to infer that Congress actually intended to immunize that entity. In fact, the presumption is precisely to the contrary. "When Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed

that restrictions on that authority are to be implied." *Burr*, 309 U.S. at 242.[4]

Specifically, this Court has made plain that a "sue-and-be-sued" clause may not lightly be reined in—it can only be limited where "necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of the Congress to use the 'sue and be sued' clause in a narrow sense." *Id.* at 245. Because this Court has found that Congress intended USPS to "be run more like a business than its predecessor . . . we must presume that the Service's liability is the same as that of any other business." *Franchise Tax Bd.*, 467 U.S. at 520. In other words, this Court has expressly declined the invitation to limit the waiver of sovereign immunity infused in USPS's sue-and-be-sued clause. And here, as was the case in *Franchise Tax Bd.*, "[n]o showing has been made to overcome that presumption." *Id.*

This case presents no new, good reason for the Court to scale back that waiver of immunity. As the Ninth Circuit held, USPS has no blanket immunity from the antitrust laws because it does not possess blanket sovereign status. See *Flamingo*, 302 F.3d at 993. Where USPS's activities have a

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[4] Another indication of Congressional intent regarding liability is where the money will come from to satisfy an adverse judgment. For instance, in *Oklahoma Mortgage Co. v. GNMA*, 831 F. Supp. 821 (W.D. Okla. 1993), the court explained that Ginnie Mae did not have funds under its control that were separate from U.S. Treasury funds. As a result, any judgment against Ginnie Mae would have been satisfied from the U.S. Treasury, and thus any judgment against it was tantamount to a judgment against the United States. Because claims against the United States are barred by sovereign immunity, absent an express waiver, claims against Ginnie Mae were likewise barred. The PRA states that "a judgment against the Government of the United States arising out of activities of the Postal Service shall be paid by the Postal Service out of any funds available to the Postal Service." 39 U.S.C. § 409(e). Hence, a claim against USPS is not tantamount to a claim against the United States.

sovereign character, those activities may be immune from antitrust challenge. However, where the activity is of a commercial character, USPS must face the music like any other business.

III. HYBRID GOVERNMENT ENTITIES HAVE CONDUCT-BASED IMMUNITY WHEN ACTING WITHIN THE SCOPE OF THEIR STATUTORY MONOPOLY.

A. The Contours of Conduct-based Immunity.

This Court has held that "there can be no doubt that Congress has full power to endow [a government corporation] with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process." *Burr*, 309 U.S. at 244. See also General Accounting Office, Report No. 97-141, *U.S. Postal Service Issues Related to Corporate Governance* 2 (Aug. 1977) (explaining that USPS has a "corporation-like organization.") Congress has often exercised this power not only to protect governmental entities from private litigation, but also to intentionally expose them to civil liability at the hands of citizens and businesses.

The Ninth Circuit held that USPS "can be sued under federal antitrust laws because Congress has stripped the Postal Service of its sovereign status by launching it into the commercial world as a sue-and-be-sued entity akin to a private corporation." *Flamingo*, 302 F.3d 993. The Ninth Circuit tempered the impact of its conclusion by acknowledging that, even bereft of blanket "status-based" immunity, USPS would nonetheless remain privileged under a more limited "conduct-based" theory of immunity. *Id.*

Conduct-based immunity applies when an entity possesses both sovereign and nonsovereign attributes. See, *e.g.*, *Name.Space, Inc.* v. *Network Solutions, Inc.*, 202 F.3d 573, 581-82 (2d Cir. 2000) (holding that a nonsovereign contractor enjoyed immunity from antitrust law to the degree it was exercising a Congressionally-mandated monopoly). GSEs are

hybrid entities with "mixed" sovereign profiles. Under prevailing case law, GSEs have been shielded from antitrust immunity only to the extent that the GSE acts pursuant to a statutory monopoly. However, if a GSE acts outside the zone of its monopoly, it does so without the benefit of such immunity, and must observe the same rules—and be subject to the same challenges—as its competitors.

Though the availability of conduct-based immunity was not the dispositive factor for the Ninth Circuit, it nonetheless provides the most logical resolution to the problem at hand. When USPS acts pursuant to its Congressionally-mandated monopoly (delivering first class and international mail), it retains its sovereign character and is shielded from liability under the Sherman Act. However, when USPS acts outside of the scope of its monopoly—e.g., selling stuffed eagles or t-shirts, delivering overnight parcels, filling money orders, allowing remittance of payment for online auctions, and, perhaps, even negotiating with suppliers over the acquisition of run-of-the-mill supplies—it no longer acts pursuant to its Congressional monopoly, and deserves no special protection under the Sherman Act.[5]

USPS's argument that it should enjoy absolute immunity from antitrust laws—even when it engages in activity unquestionably outside of its statutory monopoly—is entirely untenable. It repudiates the very purposes and effects of the reform Congress imposed on USPS. While these reforms liberated USPS to a great extent, they also tethered it to the rules of the market place.

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[5] *Amici* take no position on the question of whether USPS's procurement of mail bags—the underlying activity challenged by Respondents—is within USPS's core, limited statutory monopoly. *Amici* respectfully submit that the answer to that question requires the development of the record below.

B. The Commercial Activities of GSEs Are Indistinguishable From Those of Private Firms or Associations.

The federal government serves the interest of the public through a wide spectrum of entities that are chartered by Congress. At one end of the spectrum are entities performing only sovereign, non-commercial activities pursuant to direct, President control and Congressional oversight and appropriations. An example of such an entity would be a branch of the Armed Forces. The other end of the spectrum would include hybrid entities such as GSEs that are chartered by Congress for limited commercial purposes. GSEs are often privately owned, though their commercial activities are limited only to those expressly mandated in their charter. Examples of GSEs include the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the SLM Corporation ("Sallie Mae").

To be sure, courts have held that some governmental entities, such as the Navy, are not "persons" under the Sherman Act.[6] But none of the cases relied upon by Petitioner involves a GSE that engages in commercial behavior outside of the realm of its limited statutory monopoly.

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[6] *See, e.g., Rex Sys., Inc.* v. *Holiday*, 814 F.2d 994 (4th Cir. 1987) (holding that the Navy was not a person under the Sherman Act and thus suit could not be brought against it in connection with its procurement). See also *Sea-Land Serv. Inc.* v. *Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981) (holding that Alaska Railroad was not a "person"); *Jet Courier Serv., Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221 (6th Cir. 1983) (holding that Federal Reserve Bank is not a "person"); *Champaign-Urbana News Agency, Inc.* v. *J.L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1980) (holding that Army and Air Force Exchange Service is not a "person").

Making a distinction between commercial and non-commercial activities is a determination with which this Court is very familiar. For instance, under the Foreign Sovereign Immunities Act ("FSIA"), Congress established a framework for exercising jurisdiction over a foreign state. See 28 U.S.C. § 1602. The FSIA states that a "foreign state shall be immune" from suit unless it engages in activity which is specified in one of the prescribed exceptions. *Id.* § 1604. One such exception is the so-called "commercial exception," which provides immunity for any "act performed in the United States in connection with a commercial activity of the foreign state elsewhere." *Id.* § 1605(a)(2).

The FSIA defines "commercial activity" by reference to its "nature" rather than its "purpose." *Id.* § 1603(d). However, this Court has made clear that commercial activity is determined based upon "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade or commerce.'" *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992). Thus, "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.*

It is beyond question that the "nature" of USPS's activities undertaken outside the sphere of its monopoly is "commercial," per this Court's definition in *Republic of Argentina*. In fact, it would be ludicrous to argue that engaging in retail sales of stuffed animals or framed artwork on a commercial ".com" website, or even the sponsorship of a professional cycling team, do not constitute acts of a commercial nature. Just as a foreign sovereign that chooses to engage in commercial activity does not enjoy immunity from suit, a GSE that engages in commercial activity outside the scope of its monopoly likewise should not benefit from such immunity either.

Briefly reviewing the commercial natures and activities of prominent GSEs such as Fannie Mae,[7] Freddie Mac,[8] or Sallie Mae,[9] helps demonstrate the folly of exempting all GSEs from antitrust liability. There can be little doubt, for instance, that if Fannie Mae violated antitrust laws, it would be subject to liability thereunder. After all, it operates in the highly competitive banking market, and wields market power sufficient to force a much smaller private institution entirely out of the market.

Sallie Mae likewise competes in a highly competitive industry and ranks among the 60 largest corporations in the U.S. based on assets. There is little doubt that Sallie Mae would be similarly liable for antitrust violations. In fact, in a recent private action against Sallie Mae under the Sherman Act, Sallie Mae never argued that it is exempt based upon its status as a GSE. See *College Loan Corp.* v. *SLM Corp.*, No. 02-1377-A (E.D. Va. Oct. 14, 2002) (unpublished). On the contrary, it is Sallie Mae's official policy "to comply strictly with U.S. antitrust laws." Sallie Mae Code of Business

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[7] Congress created Fannie Mae's predecessor in 1938. The goal was to ensure the liquidity of mortgage lending by banks, and to create a more vibrant secondary mortgage market. Fannie Mae was originally owned by the federal government, became partially-privatized in the 1950s, and then fully-privatized in 1968. Though privately owned, Fannie Mae's activities are still limited by statute.

[8] Freddie Mac was established in 1970. Initially, its ownership was limited to Savings and Loan Associations that were members of the Federal Home Loan Bank Board. In 1988, the ownership restrictions were limited and Freddie Mac became publicly traded. Freddie Mac competes for essentially the same business as Fannie Mae. Though Freddie Mac and Fannie Mae are privatized companies, they nonetheless have residual ties to the federal government, which Congress is currently considering severing altogether. John D. McKinnon & Dawn Kopecki, *U.S. Pressed on Mortgage-Firm Ties*, Wall Street J., Sept. 10, 2003 at A2.

[9] Sallie Mae, which is also privately owned, primarily purchases student loans.

Conduct, *available at* http://www.salliemae.com/about/business_code.html#4 (last visited Aug. 6, 2003).

Like USPS, a GSE may compete against private actors in a way that other governmental entities do not. They also demonstrate the broad range of quasi-governmental activity in the marketplace. By way of example, the difference between a typical GSE and a sovereign entity is analogous to the difference between the Federal Reserve and the Federal Home Loan Bank System ("FHLBS"). One commentator has noted that while both provide loans:

> The Fed is the lender of *last* resort, providing discount window loans to member institutions only after they have exhausted other sources of liquidity. By contrast, the Federal Home Loan Bank System describes itself as a "lender of *first* resort for its members," offering funds at a lower cost than member institutions are likely to obtain elsewhere.

Jay Cochran & Catherine England, *Neither Fish nor Fowl: An Overview of the Big-Three Government-Sponsored Enterprises in the U.S. Housing Finance Markets*, 10-11 (2001), *available at* http://www.mercatus.org/pdf/materials/9.pdf. While USPS actively competes for business in the areas outside its limited statutory monopoly, it does not do so—indeed, it has no incentive whatsoever—to do so within its monopoly.

While acting within the scope of its monopoly, USPS's actions are not unlike those taken by federal entities such as the Navy, Library of Congress, or Federal Reserve. However, when acting outside the scope of its monopoly, it is more comparable to GSEs such as Freddie Mac, Sallie Mae, or the FHLBS, which exhibit both sovereign and nonsovereign characteristics. Because "a governmental agency engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association,'" *Global Mail*, 142 F.3d at 216, USPS is properly deemed a Sherman Act

"person" when engaging in commercial activity as a market participant.

IV. USPS MIGHT USE ITS SIZE AND COMMERCIAL FREEDOM TO HARM ITS COMPETITORS AND EXPAND THE SCOPE OF ITS MONOPOLY.

A. USPS's Expanding Corporate Empire.

"[T]he language and the legislative history of the PRA make clear that Congress intended USPS to be a . . . competitor . . . competing head-to-head with a host of private courier services." *Global Mail*, 142 F.3d at 208. In addition to simply competing with private couriers, however, USPS has greatly expanded the scope of its commercial activities, choosing to compete with a host of private enterprises outside the parameters of its statutory monopoly. Such expansion has resulted in the concomitant expansion of USPS's corporate empire.

For instance, according to Fortune Global 500, USPS is currently the 24th largest business in the world. In its 2002 *Annual Report*, USPS utilized the Fortune 500 rankings to demonstrate that, for purposes of comparison, it was the 12th largest business in the United States, exceeding all but 11 United States companies in revenue during that year. See U.S. Postal Serv., *Annual Report, 2002*, at 19 (2003).

While much of USPS's revenue is derived from its monopoly industry, billions of dollars are also derived from its non-monopoly industry, in which USPS directly competes with private sector companies. For instance, it has abandoned its <usps.gov> website, redirecting customers who attempt to access it to its commercial <usps.com> website.[10] It currently

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[10] "The Internet is divided into several 'top level' domains: .edu for education; .org for organizations; .gov for government entities; .net for networks; and .com for "commercial" which functions as the catchall domain for Internet users." *Panavision Int'l, L.P.* v. *Toeppen*, 141 F.3d

sells framed art, cycling gear, jerseys, telephone cards, t-shirts, stuffed animals, coolers, and even allows the payment for these retail sales via credit card. See generally United States Postal Serv., *at* http://www.usps.com. (last visited Sept. 14, 2003). It is thus understandable why one court explained that "a governmental agency engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association.'" *Global Mail,* 142 F.3d at 216.

In USPS's April 2002 *Transformation Plan*, its leaders expressed a desire to branch out into even more competitive markets such as retail sales, warehousing, and financial services. Such corporate ambitions, admirable from a free market standpoint, would be unquestionably disturbing if USPS were allowed to proceed with such expansion plans, basking in the light of its complete antitrust immunity.

B. Using Monopoly Powers to Expand a Monopoly.

The most serious assertion Petitioner makes is the one that it does not make explicitly: USPS should be allowed to engage in activities outside its monopoly that violate antitrust laws. If condoned by this Court, such a categorical privilege would hardly constitute the "essentially level ground" Congress envisioned in adopting the PRA. *Davric*, 238 F.3d at 61.

Owing to the sheer size and influence of USPS, it is not hard to conceive of the methods by which it could exploit this newly found right-to-monopolize, thus expanding its influence and revenues while engaging in behavior which

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1316, 1318 (9th Cir. 1998). "Commercial entities generally use the '.com' top-level domain, which also serves as a catchall top-level domain." *Interactive Prods. Corp.* v. *a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 691 (6th Cir. 2003). That USPS has abandoned its former ".gov" domain name in favor of using the ".com" version indicates that USPS perceives its activities to be commercial in nature. *See* 28 U.S.C. § 1603(d).

would bring swift legal action if carried out by any of its competitive rivals. For example, assuming USPS's argument is correct, it can begin to offer financial services, and do so knowing that it may participate in blatant anticompetitive behavior that stifles competition. It can engage in price fixing or market allocations, all without regulatory check from the Postal Rate Commission, and without judicial check under the antitrust laws.

Antitrust immunity would also allow USPS to create a strategic alliance with a competitor, as was recommended in the recently-released report from the President's Postal Commission. President's Comm. on the U.S. Postal Serv., *Embracing the Future: Making The Tough Choices To Preserve Universal Mail Service* (July 31, 2003) *available at* http://www.treas.gov/offices/domestic-finance/usps/pdf/report.pdf. By so doing, USPS, along with any strategic partner, could use their combined market power to create competitive damage to another competitor. By its own admission, USPS would not be subject to antitrust liability for any such behavior, while anomalously, its strategic partner would. Another anomaly would result from the fact that USPS—it is indeed operated under a boon of antitrust immunity—would be attempting to win contracts from private companies which do not enjoy such immunity.

Clearly, USPS embodies all of the features of a private corporate entity, particularly when engaging in commercial activities in its non-monopoly arena. It is thoroughly unsettling to think that a major commercial powerhouse with annual sales of approximately $70 billion, and which is ranked on the Global Fortune 100 list as the 24th largest company in the world, describing itself as "the hub of a $900 billion mailing industry," could simply take any anti-competitive action it deemed desirable. U. S. Postal Serv., *United States Postal Service Transformation Plan* i (Apr. 2002) *available at* http://www.usps.com/strategicdirection/transform.htm. It is beyond cavil that such actions are

precisely the sort of "unlawful combinations" that the Sherman Act was designed to prevent. 21 Cong. Rec. 2457 (1890) (Statement of Sen. Sherman).

Finally, with blanket immunity, USPS could take income from its statutory monopoly in order to operate at a loss in other markets, utilizing cross subsidies from its statutory monopoly to support the dumping of goods into these other markets. USPS also may be tempted to employ anticompetitive practices to extend its monopoly beyond those defined limits. With complete antitrust immunity, USPS would have a strong incentive to award contracts for performance *within* its statutory monopoly based on what those same customers bought or sold from USPS in areas *outside* of its limited monopoly. See generally IRET Congressional Advisory, Advisory No. 159, *Antitrust Law and the Postal Service* (Aug. 25, 2003). Such complete immunity would surely frustrate Congress's intent to allow private actions to function as a check on USPS's activities, preventing it from straying outside its carefully-prescribed parameters.

This Court has stated that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). As such, it is vital that the Act be applied as it was intended, to reach all entities—private or quasi-governmental—that have the capability of undermining the free market system.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should therefore be affirmed.

Respectfully submitted,

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